* * * *

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

Rule 32.2(b), Federal Rules of Criminal Procedure

* * * *

(b) Entering a Preliminary Order of Forfeiture.

(1) In General. As soon as practicable after a verdict or finding of guilty, or after a plea of guilty or nolo contendere is accepted, on any count in an indictment or information regarding which criminal forfeiture is sought, the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay. The

court's determination may be based on evidence already in the record, including any written plea agreement or, if the forfeiture is contested, on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

(2) Preliminary Order. If the court finds that property is subject to forfeiture, it must promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment or directing the forfeiture of specific property without regard to any third party's interest in all or part of it. Determining whether a third party has such an interest must be deferred until any third party files a claim in an ancillary proceeding under Rule 32.2(c).

(3) Seizing Property. The entry of a preliminary order of forfeiture authorizes the Attorney General (or a designee) to seize the specific property subject to forfeiture; to conduct any discovery the court considers proper in identifying, locating, or disposing of the property; and to commence proceedings that comply with any statutes governing third-party rights. At sentencing--or at any time before sentencing if the defendant consents--the order of forfeiture becomes final as to the defendant and must be made a part of the sentence and be included in the judgment. The court may include in the order of forfeiture conditions reasonably necessary to preserve the property's value pending any appeal.

(4) Jury Determination. Upon a party's request in a case in which a jury returns a verdict of guilty, the jury must determine whether the

government has established the requisite nexus between the property and the offense committed by the defendant.

STATEMENT OF THE CASE

Introduction

The Second Circuit's decision below permitting criminal forfeiture upon decision by a judge by a preponderance of the evidence, rather than by a jury beyond a reasonable doubt, disregards this Court's series of significant opinions applying the Fifth and Sixth Amendments to the United States Constitution to criminal sentencing proceedings.

Reminiscent of the federal courts' reaction to this Court's decision in *Apprendi*, 530 U.S. 466, in which those courts failed to recognize, in the absence of explicit direction from this Court, that the principles enunciated in *Apprendi* applied to the United States Sentencing Guidelines [as many continued to do even after this Court's decision in *Blakely*, 542 U.S. 296 (2004)], the Second Circuit below held that federal criminal RICO forfeiture, in which a judge is compelled to forfeit a defendant's property upon a finding by a preponderance of the evidence, does not offend the Fifth and Sixth Amendments, or run afoul of this Court's opinions in *Apprendi* and its progeny.

The decision below fails to acknowledge the inevitable conclusion that this Court's line of decisions from *Jones v. United States*, 526 U.S. 227 (1999) to *Booker*, 125 S.Ct. 738, extends to the determination of criminal forfeiture penalties the Sixth Amendment right to jury trial and the Fifth Amendment right to proof beyond a reasonable doubt. Instead, the Second

Circuit affirmed a trial judge's imposition of a $20.7 million criminal forfeiture judgment against Petitioner reached by a preponderance of the evidence standard, and based almost entirely upon acquitted conduct.

Moreover, Petitioner was deprived of a jury trial on the issue of forfeiture *solely at the election of the government* under Rule 32.2, Fed.R.Crim.P., which permits the government to foreclose a jury trial simply by seeking a money judgment as opposed to forfeiture of specified property.

In addition, in a separate issue, the Second Circuit, in effect, reduced *Crawford v. Washington*, 541 U.S. 36 (2004), to a nullity by finding that the Petitioner was not prejudiced by the erroneous introduction of his co-defendant's mid-trial guilty plea allocution, in which he made admissions about every illegal objective of the charged conspiracies, and which the trial court later allowed the government to use to corroborate other government witnesses with respect to aspects well beyond the existence of the charged conspiracies.

In finding the *Crawford* violation harmless beyond a reasonable doubt, the Second Circuit ignored the fact that, even with the plea allocution – which the trial judge later called a "blessing" to the government – the case against the Petitioner was so marginal that the jury acquitted him of 23 of the 28 counts of the indictment,[1] and convicted him only of one substantive count, a mail fraud scheme that was discussed in the co-defendant's guilty plea allocution, and RICO, RICO conspiracy, and a generic (18 U.S.C. §371) conspiracy – all of which were the subject of the guilty plea allocution.

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[1] The jury deadlocked on one Count, and fifteen others were dismissed before the case was submitted to the jury.

Statement of the Facts

Petitioner and seven other owners and/or employees of American Presort Inc. (hereinafter "API") were charged in a 44-Count Indictment alleging violations of RICO [18 U.S.C.§1962(c)]; RICO conspiracy [18 U.S.C. §1962(d)]; conspiracy to commit mail fraud and bribery [18 U.S.C. §371]; mail fraud against the United States Post Office [18 U.S.C. §1341]; postage meter fraud [18 U.S.C. §501]; false statements to the Post Office [18 U.S.C. §1001]; mail fraud against API's customers; and bribery of Post Office employees [18 U.S.C. §201]. The government alleged that API, a mail sorting and metering company, defrauded the Postal service by submitting unsorted, or inadequately sorted mail, and that it defrauded its own customers by overbilling for services.

During trial, Steven Fruchter, Petitioner's codefendant and the principal of API, pleaded guilty. At the close of the government's case, and over defense objection, the court permitted the government to introduce Steven Fruchter's guilty plea allocution, in which he admitted the existence of the conspiracy and RICO enterprise, as well as every charged criminal objective therein and thereof. At the time Steven Fruchter's guilty plea allocution was admitted, the district court instructed the jury that it could consider the plea allocution in determining whether there was a conspiracy and RICO enterprise as charged in the Indictment. Later, during the government's summation, and in response to (and overruling) defense objections, the District Court expanded the purposes for which the guilty plea allocution could be used by the jury to include corroboration of the testimony of government witnesses on topics broader than simply the existence of the charged conspiracies.

After an eleven-week trial, Petitioner was acquitted on 22 Counts and convicted on four Counts: RICO, RICO conspiracy, conspiracy to commit mail fraud and bribery, and mail fraud against API's customers. The fifteen bribery counts were dismissed after the government's case and the jury deadlocked on the postage meter fraud count.

The District Court sentenced Petitioner to a term of 60 months' imprisonment and imposed RICO forfeiture in the amount of $20,717,960. The court of appeals affirmed both the judgments of conviction and the forfeiture judgment.

Steven Fruchter's Guilty Plea Allocution

Over objection by all defendants, the District Court permitted the government to introduce at the conclusion of its case the allocution attendant to Steven Fruchter's guilty plea. For the first three weeks of trial, Steven Fruchter, the President of API, had been the lead defendant. At that juncture, after the first day of the direct testimony of the government's primary witness, Leonard Taylor, Steven Fruchter pleaded guilty and effectively disappeared from the trial.

The portion of Steven Fruchter's guilty plea allocution that was admitted was as follows:

> [b]etween 1994 and 1997, I was the President of American Presort, Inc., a mail presort business located in Manhattan. While the principal of American Presort, I worked with others, participating in various forms of criminal activity including the following pattern of criminal activity: I approved the submission of false mailing statements to [the] U.S. Post

> Office, which statements undercounted the true amount of mail and understated the amount of postage that should have been paid.
>
> I allowed qualification reports to be altered in a manner that caused the U.S. Post Office to be defrauded by falsely representing that the mail qualified for the true amount for presort postage discounts. I defrauded various customers [of] API by causing bills to customers to be inflated falsely, indicating additional charges that had not actually been incurred. I allowed a postage meter to print postage knowing that the meter was not functioning properly and knowing that as a result the postage being used was not being paid for. I approved the payment of bribes of postal employees so that they would not fully enforce various postal regulations when inspecting API mailings. I approved the commercial bribery of various API customers so that they would not fully inspect the bills or overcharges on the bills.

A. 190-91 (T. 5702).[2]

The reading of the guilty plea allocution to the jury was accompanied by the following limiting instruction delivered by the District Court:

> [t]hese statements of Steven Fruchter are being admitted only for a limited purpose. They may

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[2] "A." refers to the Joint Appendix on Appeal. "T." refers to the transcript at trial.

be considered by you only to determine whether there was an enterprise or a conspiracy of the kind charged in the indictment in his case and, if so, what were the objectives and activities of Steven Fruchter and others who you may find participated in any enterprise or conspiracy you may find to exist, if you find that such an enterprise or conspiracy did exist.

However, the question of whether any defendant in trial before you was also a member of such a conspiracy or enterprise is an issue for which you will have to rely on other evidence. There is no evidence in Steven Fruchter's statements that you have just heard that names any other defendant or coconspirator. If you find, based, in part on the statements you have just heard, that an enterprise or conspiracy as charged in the indictment exists, you must decide as a separate question whether any defendant on trial before you was a knowing part of that enterprise or conspiracy.

That decision must be based on other evidence in the case. There is nothing in these statements of Steven Fruchter that bears on that question one way or the other.

A. 191-92 (T. 5702-03).

Forfeiture Judgment

The District Court made all factual findings in support of the forfeiture sentence after the prosecutor announced that

since the government would be seeking a money judgment it "would not need to go to the jury on that matter." T. 6770. The forfeiture judgment was based on the District Court's findings with respect to the full amount of "proceeds" API had allegedly reaped as a result of the RICO "enterprise's" criminal conduct. The District Court included the amount of the Post Office fraud ($19,969,253), despite Petitioner's acquittal on those Counts (and despite the jury's deadlock with respect to the postage meter Count in which Petitioner was charged), and added that to the $748,707 customer fraud figure (for a total of $20,717,960).

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the Southern District of New York had subject matter jurisdiction of this case under 18 U.S.C. §3231; the Indictment alleged federal offenses committed there. The Second Circuit Court of Appeals had jurisdiction under 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

REASONS FOR GRANTING THE WRIT

1. The Second Circuit erred in holding that the Fifth and Sixth Amendments permit, and that this Court's decision in *Libretti*, 516 U.S. 29, authorizes, criminal RICO forfeiture to be imposed by a judge, based on a preponderance of the evidence, rather than only by a jury beyond a reasonable doubt.

The Second Circuit held that the Fifth and Sixth Amendments do not provide Petitioner the right to have a jury determine beyond a reasonable doubt all facts required to support a criminal RICO forfeiture judgment. The Court's holding was based on two rationales: (1) "criminal forfeiture [i]s 'an aspect of sentencing' . . . beyond the Sixth Amendment's purview." *Fruchter*, 411 F.3d at 380-81, *quoting Libretti*, 516 U.S. at 49; Appx. 7; and (2) facts necessary to impose criminal RICO forfeiture can be found by a judge pursuant to the preponderance standard because forfeiture does not prescribe a statutory maximum penalty that such judge-determined facts could exceed.[3]

Both of these holdings warrant this Court's review. The fundamental and fatal flaw in the Second Circuit's conclusion is its misreading of this Court's recent line of decisions

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[3] Other courts have also held since *Blakely* and/or *Apprendi* that judge-determined criminal forfeiture (by the preponderance standard) is unaffected by this Court's Fifth and Sixth Amendment analysis in those (and other) cases. *See also, e.g., United States v. Messino*, 382 F.3d 704, 713 (7th Cir. 2004); *United States v. Gasanova*, 332 F.3d 297, 300-1 (5th Cir. 2003); *United States v. Shyrock*, 342 F.3d 948 (9th Cir. 2003); *United States v. Najjar*, 300 F.3d 466, 486 (4th Cir. 2002).

interpreting the Fifth and Sixth Amendments.[4] Those decisions make it indisputable that a defendant has the right to have a jury determine, beyond a reasonable doubt, any fact required to increase the criminal penalty. *See Blakely*, 542 U.S. at 304 ("[w]hen a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority") (citation omitted); *Booker*, 125 S. Ct. at 756 ("[a]ny fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt").[5]

Consequently, the Second Circuit's focus on "statutory maximums," as opposed to the punishment authorized by the jury's verdict alone, misses the point of *Jones*, *Apprendi*, *Blakely*, and *Booker* entirely. *See United States v. Malouf*, 377 F. Supp.2d 315, 324 (D. Mass. 2005) (Supreme Court's "concern [in *Blakely*] was not simply about a fact's effect on the statutory maximum, but more generally, about its effect on

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[4] *See Jones*, 526 U.S. 227; *Apprendi*, 530 U.S. 466; *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely*, 542 U.S. 296; *Booker*, 125 S.Ct. 738.

[5] Indeed, since forfeiture is plainly an additional penalty not authorized by a jury verdict solely on the issue of guilt, eminent forfeiture commentators have noted that *Apprendi* and its progeny require that criminal forfeiture must be proven to a jury beyond a reasonable doubt. 2 David B. Smith, *Prosecution and Defense of Forfeiture Cases*, 14.03A, at 14-52 to 14-55 (2005 Rev.); *see also* Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 Fed. Sent. R. 316, 2004 WL 2235851 (June 2004) ("because judges may not impose forfeiture of defendant's assets without specific factual findings that are not . . . part of the underlying conviction, these facts must be determined by a jury beyond a reasonable doubt").

punishment"). This Court made it unmistakably clear in *Blakely* and *Booker* that the principle enunciated in *Apprendi* and its progeny is not nearly so narrow or technical, and that the "statutory maximum" is only what is authorized by the jury's verdict. *See Blakely*, 542 U.S. at 304; *Booker*, 125 S.Ct. at 756 [both quoted **ante**, at 13].

Since *Blakely*, several courts have recognized that the current criminal forfeiture framework may be constitutionally infirm. *See United States v. Leahy*, 03-4490 (3d Cir. Sept. 19, 2005) (*sua sponte* rehearing *en banc* ordered to determine whether *Booker* applies to criminal forfeiture judgments); *United States v. Cianci*, 02-2158 (1st Cir. April 5, 2005) (vacating criminal forfeiture judgment and remanding to the district court for resentencing under *Booker*); *United States v. Visinaiz*, 344 F. Supp.2d 1310, 1316 (D. Utah 2004) (Cassell, J.) ("with the appearance of *Blakely*, matters such as forfeiture ... which had once seemed relatively straight-forward suddenly became more complicated").

In this context, the facts necessary to support a criminal conviction (that is, the elements of the offense) alone are not sufficient to support forfeiture as part of Petitioner's punishment, the "statutory maximum" forfeiture authorized by the jury verdict alone is *zero*. Accordingly, the additional criminal penalty of RICO forfeiture cannot be imposed unless supplemental facts are proven beyond a reasonable doubt and (absent a valid waiver) by a jury.[6]

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[6] Here, as detailed **post**, at POINT II, the government, by invoking Rule 32.2, Fed.R.Crim.P., unilaterally deprived Petitioner of a jury trial on the issue of criminal RICO forfeiture.

Criminal forfeiture is a form of punishment. *See United States v. Bajakajian*, 524 U.S. 321, 328 (1998) ("[w]e have little trouble concluding that the forfeiture of currency ordered by [18 U.S.C.] §982(a)(1) constitutes punishment"); *and compare* 18 U.S.C. §1963 (criminal RICO forfeiture) *with* 18 U.S.C. §1964 (civil RICO forfeiture). Moreover, as the Second Circuit noted below, RICO forfeiture is *mandatory* upon the finding of certain requisite facts. *Fruchter*, 411 F.3d at 382; Appx. 11.

It is equally plain that the criminal RICO forfeiture judgment increased the maximum punishment otherwise available for the underlying offense(s) for which Petitioner was convicted, and that this increased penalty was available only after proof of two additional indispensable facts: the Petitioner has "property," 18 U.S.C. §1963(a)(3); and the property "constitut[es] or derive[s] from, any proceeds . . . obtained directly or indirectly, from racketeering activity." *Id.* The jury verdict alone did not authorize any forfeiture at all; absent proof of these two additional facts, the maximum punishment for the offense would be imprisonment, a fine, and a special assessment. That is the end of the matter under *Blakely* and *Booker*.[7]

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[7] The Second Circuit suggested that this Court in *Booker* already passed on this forfeiture issue when it did not strike down the section of 18 U.S.C. §3554, which directs the district court to order forfeiture in accordance with 18 U.S.C. §1963 when imposing a sentence following a conviction under 18 U.S.C. §1962. *Fruchter*, 411 F.3d at 382; Appx. 11. Regardless of whether §3554 and §1963 offend the Sixth Amendment [a conclusion made unlikely by the fact that neither statute mentions the right to a jury trial, or the appropriate burden of proof, and the rule of constitutional avoidance counsels against implying such an unconstitutional construction, *see McConnell v. FEC*, 540 U.S. 93(2003)], Rule 32.2 does violate the Sixth Amendment jury trial right by

Moreover, there exists a long history of case law establishing that RICO criminal forfeiture under 18 U.S.C. §1963 requires a jury verdict beyond a reasonable doubt. *See, e.g., United States v. Pelullo*, 14 F.3d 881, 903-06 (3d Cir. 1994) (citing to legislative intent and the Department of Justice's manual on RICO prosecutions, to conclude that the RICO forfeiture burden of proof is beyond a reasonable doubt); *United States v. Dunn*, 802 F.2d 646, 647 (2d Cir. 1986) (court agrees with government that criminal forfeiture under 21 U.S.C. §853 requires proof beyond a reasonable doubt); *United States v. Ida*, 14 F. Supp.2d 454, 459 (S.D.N.Y. 1998) (RICO forfeiture must be proved beyond a reasonable doubt); *United States v. Pryba*, 674 F. Supp. 1518, 1520-21 (E.D. Va. 1987) (beyond a reasonable doubt standard applies to RICO forfeiture).

Thus, denying Petitioner a jury trial for determination beyond a reasonable doubt whether he was subject to criminal RICO forfeiture is contrary not only to the principles this Court has steadfastly repeated since *Jones*, but also the pre-existing specific principles relevant to criminal RICO forfeiture.

Yet, instead of acknowledging these RICO forfeiture principles, and/or the sea change in sentencing law – which the

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denying a jury finding in the forfeiture context. *See, e.g.*, **post** at 20.

Moreover, the full impact of *Booker* on the validity of various aspects of federal criminal sentencing is not limited to that which was addressed expressly in *Booker*. *See, e.g., United States v. Selioutsky*, 409 F.3d 114 (2d. Cir. 2005) (excising 18 U.S.C. §3553(b)(2)); *United States v. Gonzalez*, 420 F.3d 111 (2d. Cir 2005) (holding that under *Apprendi*, drug quantity must be admitted or proven to a jury beyond a reasonable doubt, in a prosecution under 21 U.S.C. §841(a) when used to subject the defendant to an enhanced prison sentence).

Second Circuit panel dismissed as having only "surface appeal," *Fruchter*, 411 F.3d at 382, Appx. 10 – ushered in by *Booker* (and its progenitors), the Court below retreated to arguments made by the government and courts in the initially successful, but ultimately discredited, defense of the United States Sentencing Guidelines after *Apprendi* and *Ring* (and, in some instances, even after *Blakely*).

Yet those arguments, and the Guidelines, were invalidated by *Booker*. Here, the lower courts again need explicit guidance from this Court in applying the principles it has set forth in its inexorable series of cases. Just as even after *Apprendi* the lower courts continued to sustain state and federal sentencing guidelines that permitted a judge to increase the penalty authorized by the jury's verdict, and to do so by only a preponderance of the evidence, following *Blakely* and *Booker* the lower courts have nevertheless refused to acknowledge that the Fifth and Sixth Amendments prohibit *all* forms of increased criminal punishment imposed by judicial factfinding that were not authorized by the jury's verdict beyond a reasonable doubt.

A. Language in *Libretti* suggesting that the Sixth Amendment has no application in the forfeiture sentencing is either *dictum* or should be revisited.

The Second Circuit also found that *Libretti*, 516 U.S. 29, controlled, despite the fact that *Libretti* is entirely inapposite because in that case *the defendant pleaded guilty*, and "agreed to forfeit numerous items of his property to the Government."

516 U.S. at 31.[8] In that context, even after *Booker*, some courts have held that a guilty plea waives the right to insist on a jury determination (beyond a reasonable doubt) as to issues relevant to sentencing. *See United States v. Serrano-Beauvaix*, 400 F.3d 50 (1st Cir. 2005); *United States v. Sahlin*, 399 F.3d 27 (1st Cir. 2005). Here, in contrast, not only did the Petitioner proceed to trial, and contest the amount of forfeiture, but the forfeiture amount imposed on him was based almost entirely on conduct for which he was acquitted.

Also, the questions presented, and answered, in *Libretti* were (a) whether a "factual basis for forfeiture exist[ed] for a stipulated asset forfeiture embodied in a plea agreement[;]" and (b) whether a special jury verdict on forfeiture could only be waived in writing, and after the defendant had been specifically advised by the District Court of the nature and extent of his rights to the special verdict. 516 U.S. at 31-32. In answering the first in the affirmative and the second in the negative, the Court in *Libretti* performed its analysis entirely under Rule 11, Fed.R.Crim.P., which is germane to guilty pleas, and not trials. 516 U.S. at 32-42.

Indeed, while noting the Advisory Committee's, 18 U.S.C.App., p. 786, "assumption" that "the amount or interest or property subject to forfeiture is an element of the offense to be alleged and proved[,]" and finding that unpersuasive, the Court added that "even supposing that the Committee's assumption is authoritative evidence with respect to the

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[8] Other courts have relied upon *Libretti* in holding that *Apprendi* is inapplicable to criminal forfeiture judgments. *See, e.g., United States v. Keene*, 341 F.3d 78, 85 (1st Cir. 2003); *United States v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001) (*per curiam*); *United States v. Corrado*, 227 F.3d 543, 549 (6th Cir. 2000).

amendments to Rules 7, 31, and 32, *it has no bearing on the proper construction of Rule 11*." 516 U.S. at 41 (emphasis added). Consequently, it is indisputable that *Libretti*, to the extent it remains viable, is limited to the Rule 11 context – and even in that setting the Court required a "factual nexus requirement" in order to limit government overreaching. 516 U.S. at 42. Here, that "factual nexus" was decided entirely by the judge, and by the preponderance standard. That form of adjudication simply does not survive *Blakely* and *Booker*.[9]

Moreover, *Libretti's* brief analysis of the issue was based upon the now-rejected notion that, with the exception of the death penalty, the Sixth Amendment has no application to sentencing, and thus is no more controlling in the trial context than were the prior cases, cited by the government in *Booker*, that had previously and invariably, upheld the Guidelines. *See Booker*, 125 S. Ct. at 753-54. Thus, *Libretti* is distinguishable, and, even if not, it does not save RICO criminal forfeiture from the effect of *Booker* and *Blakely*, and the inexorable logic and application of their principles.

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[9] Also important is the fact that Section III of the majority opinion in *Libretti*, and in which the language cited by the Second Circuit appears, *was not joined by Justices Souter and Ginsburg*. 516 U.S. at 52-54 (Souter, J., *concurring in part and concurring in the judgment*; Ginsburg, J., *concurring in part and concurring in the judgment*). Justices Scalia and Thomas declined to join in another part of the opinion (Parts II-B and II-C). 516 U.S. at 31. In that context, it is noteworthy that this Court has consistently declined to cite *Libretti* as precedent since it was decided.

2. Rule 32.2, Fed.R.Crim.P., which permits the government at its unilateral election to deny a defendant a jury trial on the issue of criminal RICO forfeiture violates the Sixth Amendment right to a jury trial and irreconcilably conflicts with this Court's decisions in *Booker*, 125 S.Ct. 738, *Blakely*, 542 U.S. 296, and *Apprendi*, 530 U.S. 466.

Given the importance our society rightly attaches to the protection of private property rights, it seems incongruous to maintain that "a lone employee of the State[,]" *Blakely*, 124 S. Ct. at 2543, may constitutionally deprive a defendant of all his property without the safeguard of a jury to find the facts on which such an important judgment rests. Here, that error has been compounded because under Rule 32.2, Fed.R.Crim.P., that "lone employee" is the *prosecutor*, who alone chooses whether the defendant will have a jury trial on the forfeiture sentence by seeking a personal money judgment as opposed to the forfeiture of specific property. *Compare* Rule 32.2(b)(1), Fed.R.Crim.P. *with* Rule 32.2(b)(4), Fed.R.Crim.P.; *Cf. United States v. Moon*, 718 F.2d 1210, 1217-18 (2d Cir. 1983) (before waiver of right to jury trial can be effective, consent of prosecutor and sanction of court must be obtained).

Therefore, just as the string of cases running from *Jones* through *Booker* invalidated the Guidelines, Rule 32.2, Fed.R.Crim.P., must also be struck down for violating the Sixth Amendment right to a jury trial.

3. The Second Circuit erred in finding that the introduction of a co-defendant's guilty plea – for the purpose of corroborating the testimony of other witnesses as well as to establish the charged conspiracies–at Mr. Braun's trial, an acknowledged violation of his Sixth Amendment right to confrontation as defined in *Crawford*, 541 U.S. 36 (2004), constituted harmless error.

Regarding the introduction of the co-defendant's guilty plea allocution – which the government conceded (and the Second Circuit agreed) constituted a Sixth Amendment violation pursuant to *Crawford*, 541 U.S. 35 (2004) – Petitioner's circumstances present the question whether *Crawford* will have any retrospective application to those whose trials were infected by the introduction of guilty plea allocutions. If the error was harmless beyond a reasonable doubt here with respect to Petitioner, then *Crawford* is in effect meaningless to those defendants whose cases were in the "pipeline" when *Crawford* was decided.

Over strenuous objection by all defendants, the District Court permitted the government to introduce Steven Fruchter's[10] guilty plea at the conclusion of its case. For the first three weeks of trial, Steven Fruchter, as the President of API and Mr. Braun's business partner, had been the lead

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[10] Steven Fruchter was the principal of API, the business that constituted the racketeering "enterprise" in the charges brought under RICO. Mr. Braun was his partner – the other partner being Steven's brother, Philip Fruchter, who, prior to *Crawford*, withdrew his appeal – and that relationship, as well as Mr. Braun's position as Treasurer were consistently seized upon by the government as a basis for finding that Mr. Braun either knew of the charged frauds and willingly participated, or consciously avoided knowing of them.

defendant. At that juncture, Steven Fruchter pleaded guilty and effectively disappeared from the trial.

With respect to Mr. Braun, the testimony of Leonard Taylor, the government's chief witness, was vague and generalized, and failed to establish Mr. Braun's knowledge and/or intent to participate in, or conspire to participate in, any of the charged conduct. Indeed, the overwhelming majority of Mr. Taylor's testimony about Mr. Braun did not in any way relate to illegality. Instead, it comprised merely a catalogue of the legitimate functions Petitioner performed at and for API.

Mr. Taylor also testified about conversations with the Petitioner in which inherently ambiguous terms, susceptible of multiple meanings – some illicit, and some ordinary – were used but not explained. In those instances, it is only *Mr. Taylor's* version of what *he* meant and understood, and not Petitioner's meaning and understanding, that are in the record. Thus, those conversations fail to prove any illicit knowledge on the Petitioner's part. Indeed, those equivocal conversations to which Mr. Taylor testified were all related to the *post office fraud*, of which Mr. Braun was acquitted and none alleged Mr. Braun's knowledge and/or intent with respect to the *customer* fraud.

Despite the extensive volume of conversations Mr. Taylor had with Mr. Braun throughout their tenure at API – including Mr. Braun calling daily while on vacation – Mr. Taylor did not testify to a single conversation in which he and Mr. Braun discussed API's fraudulent billing of customers.

The two production floor employees the government called as witnesses did not implicate Mr. Braun in the slightest in any scheme to defraud the Post Office or customers. Claudia

Pearce, a manager of the mail sorting operation at API who had pleaded guilty and was a cooperating government witness, T. 3191-92, 3197-3200, detailed her own participation, and that of others at API, in the fraud on the Post Office perpetrated at API. T. 3222-3302. However, *that did not include the Petitioner.* Instead, Ms. Pearce's testimony with respect to the Petitioner did not imply any criminal knowledge and/or intent. David Sam, another production employee who testified for the government pursuant to a plea and cooperation agreement, had even less to say about Mr. Braun.

The technical and administrative employees of API established that Mr. Braun was ignorant of the illicit nature of the mailings, which was withheld from him. For example, Mitchell Grand, one of the technicians at API (and another cooperating government witness), did not provide any incriminating evidence against Mr. Braun. Likewise, Manuel Kaplan, an additional cooperating government witness who worked in the accounting department at API testified that he knew that customers' bills were inflated by both Lenny Taylor and Steven Fruchter, *but he did not share that knowledge with Mr. Braun.* T. 4529.

In sharp contrast to the weakness of the government's case against Mr. Braun, the extremely adverse impact of Steven Fruchter's guilty plea allocution stemmed not only from the extraordinarily prejudicial nature of the allocution itself,[11] but also from several factors unique to this case (*see* **ante**, at 21-

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[11] The length and detail of the allocution itself, as well as its breadth – covering every illegal objective of the charged conspiracy and RICO enterprise – aggravated the Confrontation Clause violation considerably, since it is obvious that the scope of the allocution was carefully orchestrated to be of maximum benefit to the government.

22), in which the allocution itself was introduced as the last piece of evidence, and the crowning moment, in the government's direct case.

In addition, language in the District Court's instruction permitted the jury to use the allocution for purposes beyond simply establishing the existence of the charged conspiracy and RICO enterprise: the allocution could be considered with respect to "what were the objectives and activities of Steven Fruchter *and others* who you may find participated in any enterprise or conspiracy you may find to exist, if you find that such an enterprise or conspiracy did exist." A. 191-92, T. 5702-03 (emphasis added).

The importance of the guilty plea allocution to the government's case, and the overwhelming prejudice the defendants suffered as a consequence of its admission, is also vividly evident from the government's abundant use of it during its summations. For example, in its initial summation, the government, within a page after commencing, argued that,

> [a]nd now, after two and a half months of hearing evidence in this case, you know that each of those crimes did, in fact, take place at American Presort, that stealing and lying were commonplace and routine in the business of American Presort, that stealing and lying was how American Presort did business. *You know that because Steven Fruchter, in a sworn guilty plea in federal court, admitted that as president of American Presort he ran the company as a criminal enterprise.*

T. 6085 (emphasis added).

In its rebuttal summation, too, the government began by citing the plea allocution as a basis for finding that API was operated as a "criminal enterprise," T. 6777, and then shortly thereafter argued as follows:

> [l]et's review for a few minutes what Leonard Taylor told you and how it is corroborated because, after all, ladies and gentlemen, *corroboration is the key*. Corroboration is what tells you that what Leonard Taylor told you was corroborated again and again and again, that's how you know that he was telling you the truth

T. 6784 (emphasis added). The government then proceeded to invoke Steven Fruchter's guilty plea no less than five additional times in an effort to corroborate Mr. Taylor's testimony, including the following references, all made with maximum rhetorical flourish. *See* T. at 6784-6785, 6789, 6792, 6793, and 6795.

That improper use of the guilty plea allocution – to corroborate other witnesses (beyond merely the existence of the conspiracy) – was also endorsed by the District Court when defense counsel objected during the government's summation. T. 6820-21. The District Court denied the motion, stating that "[i]t is not a misuse of . . . Steven Fruchter's plea to point out how it is consistent with other evidence." T. 6821. Consequently, the Second Circuit was incorrect in claiming that "The plea allocution was admitted only to show the existence of the conspiracy[.]" Appx. at 19.

In fact, retrospectively as well, the District Court recognized the importance of the allocution. For instance, at Steven Fruchter's sentencing, during argument concerning

whether he had pleaded guilty sufficiently promptly receive a third point for "acceptance of responsibility," the District Court, in granting that third point, pointed out with respect to the timing of Steven Fruchter's guilty plea that "[t]hose issues from the government's standpoint were a blessing, not a curse. . . . That is one that the government eagerly embraced." S.A. 5.[12] *See also* S.A. 6 (District Court notes that "the government used the plea . . . to its advantage. And that counts for something").

Moreover, in holding that the admission of Steven Fruchter's guilty plea allocution was harmless beyond a reasonable doubt, the Second Circuit ignored the fact that the guilty plea allocution – which the District Court's limiting instruction directed principally at the conspiracy and RICO charges – could very well have accounted for the jury's split verdict with respect to Petitioner – convicting him only on the RICO and conspiracy charges, and one substantive count charging an overarching mail fraud scheme directed at customers, while acquitting him or deadlocking on the remaining substantive charges. *See Holland v. Scully*, 797 F.2d 57, 67 (2d Cir. 1986) (error "cannot be 'harmless' if there 'is a reasonable possibility that the improperly admitted evidence contributed to the conviction'") (citations omitted).

Thus, Steven Fruchter's guilty plea allocution was prejudicial, and overwhelmingly so, in multiple ways: its content, its timing, the limiting instruction's permission to use it against "others," and its repeated use in summation to buttress the testimony of otherwise unreliable witnesses. As a result, admission of the guilty plea cannot constitute harmless error.

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[12] "S.A." references Petitioner's Supplemental Appendix, appended to his Reply Brief before the Second Circuit which contains the transcript of Steven Fruchter's sentencing.

Conclusion

For all the reasons set forth above, it is respectfully submitted that this Petition for a writ of *certiorari* should be granted, the Court of Appeals decision reversed, and a new trial ordered. In the alternative, the Court should vacate the forfeiture judgment and remand the matter for resentencing.

Dated: November 9, 2005
New York, New York

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2003

(Argued June 14, 2004 Decided **June 14, 2005**)

Docket Nos. 02-1422(L), 02-1451(CON), 02-1474(CON), 02-1542(CON), 02-1552(CON), 02-1561(CON)

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UNITED STATES OF AMERICA,

Appellee,

-v.-

PHILIP FRUCHTER, LAWRENCE* BRAUN, DAUDA YAGUE, MAMADOU SYLLA, SAMBA WILLIAM and FRANK SINGH,

Defendants-Appellants,

STEVEN FRUCHTER, MITCHELL GRAND, MIGUEL MERCEDES and MUNINAUTH PULCHAN,

Defendants.

---x

Before: WALKER, *Chief Judge,* B.D. PARKER and WESLEY, *Circuit Judges.*

Appeal from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York (Michael B. Mukasey, *Chief Judge*). Defendant-appellant Braun challenges, *inter alia,*

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* The correct spelling of petitioner's first name is Laurence.

the constitutionality, under the Sixth Amendment, of the district court's imposition of criminal forfeiture.

AFFIRMED and REMANDED for further proceedings consistent with *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 739 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

JOSHUA L. DRATEL (Marshall A. Mintz, *on the brief*), Joshua L. Dratel, P.C., New York, NY, *for Defendant-Appellant Lawrence Braun*

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WILLIAM J. STAMPUR, Hurwitz Stampur & Roth, New York, NY, *for Defendant-Appellant Mamadou Sylla*

DANIEL NOBLE, New York, NY, *for Defendant-Appellant Samba William*

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ROBIN W. MOREY, Assistant United States Attorney (David N. Kelley, United States Attorney for the Southern District of New York, Sarah Lai, Barbara A. Ward, Laura Grossfield Birger, and Gary Stein, Assistant United States Attorneys, *on the brief*), New York, NY, *for Appellee*

JOHN M. WALKER, JR., *Chief Judge*:

Defendants-appellants[1] Lawrence Braun, Daouda Yague, Mamadou Sylla, Samba William, and Frank Singh appeal their convictions in the United States District Court for the Southern District of New York (Michael B. Mukasey, *Chief Judge*), following an eleven-week jury trial, for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 19[illegible] *et seq.*, the federal mail fraud statute, 18 U.S.C. § 13[illegible], and the federal conspiracy statute, 18 U.S.C. § 371.

Appellants raise numerous challenges to their convictions and sentences, all but one of which we address in a summary order, filed today, that affirms the district court in part and remands for proceedings consistent with *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). The sole issue addressed in this opinion is the constitutionality under the Sixth Amendment[2] of the district court's imposition, pursuant to 18 U.S.C. § 1963, of a forfeiture order against appellant Braun, in light of the Supreme Court's decisions in *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Booker*, where the forfeiture amount was based in part on facts found by the district judge by a preponderance of the evidence. The disposition of this appeal was delayed to accommodate the legal developments that followed upon *Blakely* and culminated in *Booker*. We now affirm.

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[1] Appellant Philip Fruchter withdrew his appeal with prejudice prior to briefing or oral argument.

[2] Braun's other challenges to the forfeiture order are addressed in our summary order issued today.

BACKGROUND

From at least 1994 until 1997, Braun – along with Steven and Philip Fruchter – owned and operated a mail sorting and metering company in Manhattan called American Presort, Inc. ("API"). API acted as a kind of middleman between the Postal Service and private companies engaged in bulk mailings. The companies would send large numbers of letters to API for sorting and (in some cases) metering. API would then either transport the processed mail to the post office or have the postal employees pick it up. In theory, this arrangement benefitted everyone concerned. Pursuant to the Postal Service's "work share" regulations, API – in return for doing preliminary mail processing work – received discounted postage rates. It then, in theory, passed some of those savings on to its customers, achieving profit by charging a rate somewhere between the standard rate and the discounted rate. The customers saved money, and the Postal Service was spared a considerable amount of work.

In practice, however, API was overcharging its customers, passing off unsorted mail as sorted mail, using defective postage meters to get free postage, bribing postal employees and customer employees, and underrepresenting to the Postal Service the number of letters it had processed. Braun, a one-third co-owner of API, was in charge of finances and garnered substantial proceeds from API's illegal activities.

The government charged Braun in a multi-count indictment. After an eleven-week jury trial, Braun was convicted of (1) racketeering, based on mail fraud against API's customers; (2) RICO conspiracy; (3) general conspiracy; and (4) mail fraud against customers. The jury,

however, acquitted Braun of mail fraud against the Postal Service and of making false statements to the Postal Service, and deadlocked on the charge of postage meter fraud.

On July 9, 2002, the district court sentenced Braun principally to sixty months' incarceration and ordered criminal forfeiture, pursuant to 18 U.S.C. § 1963, of approximately $20.7 million. That amount, like certain sentencing enhancements imposed by the district court, was based in part on proceeds derived from conduct with which Braun had been charged, but of which he was ultimately acquitted. This appeal followed.

DISCUSSION

Braun claims that the district court's imposition of criminal forfeiture pursuant to 18 U.S.C. § 1963 violated the Sixth Amendment.[3] Specifically, Braun contends that under the Supreme Court's decisions in *Blakely* and *Booker*, the district court was required to determine the forfeiture amount only by reference to conduct that had been proved to the jury beyond a reasonable doubt.

I. Preliminary Issues

Before discussing the merits of Braun's claim, we address two preliminary matters. First, the parties dispute

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[3] Section 1963 sets forth the criminal penalties for RICO violations. It provides, *inter alia*, that anyone convicted under § 1962, the substantive RICO provision, "shall forfeit to the United States . . . any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962." 18 U.S.C. § 1963(a)(3).

the proper standard of review. The government contends that Braun's forfeiture claim is reviewable only for plain error because he did not raise a Sixth Amendment challenge to the forfeiture order below.[4] *See Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1548-49, 137 L. Ed. 2d 718, 727 (1997). Braun, however, maintains that he expressly preserved before the district court a Sixth Amendment challenge to the inclusion of acquitted conduct in his sentence and forfeiture amount, and, therefore, that the harmless error standard applies. *See, e.g., United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993). Determining the appropriate standard of review to apply to claims of constitutional error, however, is crucial only when an error actually exists. *See United States v. Dinome*, 86 F.3d 277, 282 (2d Cir. 1996). Because we conclude that the district court committed no error, it is unnecessary to determine the applicable standard of review.

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[4] Forfeiture proceedings were conducted in May 2002, and the district court entered a preliminary order of forfeiture in June 2002, which was after *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), but well before either *Blakely* or *Booker*. The government argues that because Braun did not raise an *Apprendi* challenge to the forfeiture order, his claim is reviewable only for plain error. The government recognizes that if *Booker* and *Blakely* were considered "supervening judicial decision[s]," this court might apply our modified plain error rule, under which the government bears the burden of persuasion as to whether substantial rights have been affected. *See United States v. Thomas*, 274 F.3d 655, 668 n.15 (2d Cir. 2001) (en banc). The continuing validity of that rule, however, is unclear. *See United States v. Bruno*, 383 F.3d 65, 79 n.8 (2d Cir. 2004). The government, however, asserts that *Booker* and *Blakely* are not supervening decisions because they are "no more directly applicable . . . than was *Apprendi*." Gov't Letter Br., at 2 n.3 (Mar. 25, 2005). As discussed above, this appeal does not require us to resolve either (1) whether *Booker* and *Blakely* are supervening decisions in this context, or (2) if they are, whether the modified plain error rule continues to apply.

Second, we note that our consideration of Braun's claim is somewhat unusual. The Supreme Court has held that there is no Sixth Amendment jury trial right to a forfeiture determination. *Libretti v. United States*, 516 U.S. 29, 49, 116 S. Ct. 356, 367-68, 133 L. Ed. 2d 271, 289 (1995). Relying on *Libretti*, we have previously rejected claims that proof beyond a reasonable doubt is required in forfeiture proceedings. *See, e.g., United States v. Bellomo*, 176 F.3d 580, 595 (2d Cir. 1999). Because *Libretti* has direct application in this case, we are bound by its holding even if it might appear "to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Nevertheless, we consider Braun's forfeiture argument at some length because of the change wrought by *Blakely* and *Booker* in the law of criminal punishment. Although we are bound by *Libretti*, we decline to rely solely on that case's reasoning in affirming the district court's forfeiture order.

In *Libretti*, the Supreme Court held that "the right to a jury verdict on forfeitability does not fall within the Sixth Amendment's constitutional protection." *Libretti*, 516 U.S. at 49, 116 S. Ct. at 367-68. Specifically, the Court found that criminal forfeiture was "an aspect of sentencing" and thus fell beyond the Sixth Amendment's purview. *Id.* at 48, 116 S. Ct. at 367-68; *see also Bellomo*, 176 F.3d at 595 ("[C]riminal forfeiture is part of the process of criminal sentencing. Fact-finding at sentencing is made by a preponderance of the evidence." (internal citation omitted)). In other words, *Libretti* and its progeny relied on a distinction between determinations of guilt and determinations of punishment. The latter, under *Libretti*, simply were not subject to the Sixth Amendment's requirements.

Braun argues that the distinction between guilt and sentencing determinations, however, has been undermined by three subsequent Supreme Court cases that have revolutionized criminal sentencing. In essence, Braun contends that *Apprendi* and its progeny have so undercut *Libretti* as to have overruled it sub silentio. In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the *penalty* for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362-63 (emphasis added). Four years later, the Court extended *Apprendi*'s reach to Washington State's determinate sentencing regime, finding that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts [beyond what the jury has found], but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. ___, 124 S. Ct. at 2537 (emphasis in original). Accordingly, the *Blakely* Court reiterated that the maximum sentence a judge may impose is the sentence authorized "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* (emphasis omitted). In *Booker*, the Supreme Court applied *Blakely's* logic to the federal Sentencing Guidelines and found them unconstitutional because they mandated sentencing enhancements above the Guidelines range authorized solely by the jury's verdict, where the sentencing judge found certain facts by a preponderance of the evidence. 543 U.S. ___, 125 S. Ct. at 756.

Braun argues that in extending *Apprendi*'s Sixth Amendment holding to the sentencing context, *Blakely* and *Booker* implicitly call into question *Libretti*'s reasoning. For him it seems implausible that, after *Blakely* and

Booker, a Sixth Amendment right to a jury trial is unavailable in the criminal forfeiture context simply because criminal forfeiture is not part of the guilt determination, but is rather part of the sentencing determination. *Blakely* and *Booker*, after all, found the Sixth Amendment's guarantees to be directly applicable to sentencing proceedings.[5] While *Libretti* remains the law until the Supreme Court expressly overturns it, *see Rodriguez de Quijas*, 490 U.S. at 484, we address Braun's reading of *Blakely* and *Booker* because we recognize that the conception of criminal punishment contained in those opinions is not necessarily the same conception of criminal punishment underlying the analysis in *Libretti*. We conclude that the preponderance standard established in *Libretti* nevertheless remains the rule.

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[5] Numerous circuit court opinions issued after *Apprendi*, but before *Blakely* and *Booker*, have held that *Apprendi* is inapplicable to criminal forfeiture proceedings because forfeiture is an aspect of "sentencing" rather than a "separate charge." *United States v. Keene*, 341 F.3d 78, 85-86 (1st Cir. 2003); *see also United States v. Cabeza*, 258 F.3d 1256, 1257 (11th Cir. 2001) (per curiam) ("Because forfeiture is a punishment and not an element of the offense, it does not fall within the reach of *Apprendi*."); *United States v. Corrado*, 227 F.3d 543, 550 (6th Cir. 2000) (same); *cf. United States v. Swanson*, 394 F.3d 520, 526 n.2 (7th Cir. 2005) (noting in a post-*Blakely*, *pre-Booker* decision that "[w]e [previously] held . . . that because criminal forfeiture [is an] element[ ] of the defendant's sentence rather than of the underlying crime, the government need only establish its right to forfeiture by a preponderance of the evidence rather than by proof beyond a reasonable doubt," and raising, without deciding, the question of "[w]hether this reasoning [would] survive[ ] the court's decision in *Booker* and *Fanfan*").

II. Sixth Amendment Analysis

Braun's argument has a certain surface appeal. *Booker* and *Blakely* broadly hold that any fact that increases the punishment imposed on a defendant must be found by a jury beyond a reasonable doubt. *See Blakely*, 542 U.S. ___, 124 S. Ct. at 2537 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority." (internal quotation marks and citation omitted)). And forfeiture is undoubtedly punishment. *See Libretti*, 516 U.S. at 41, 116 S. Ct. at 364 ("[F]orfeiture is precisely that: punishment."); *United States v. Lizza Indus., Inc.*, 775 F.2d 492, 498 (2d Cir. 1985) ("Forfeiture under RICO is a punitive, not a restitutive, measure."). Indeed, the statutory provision providing for RICO forfeiture is titled "Criminal penalties." 18 U.S.C. § 1963.[6]

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[6] At least one court has justified a preponderance standard in forfeiture proceedings in part by characterizing criminal forfeiture as historically a civil remedy. *See United States v. Melendez*, 401 F.3d 851, 856 (7th Cir. 2005) (concluding preponderance standard suffices "because forfeiture has long been a civil remedy as well as a criminal sanction"); *United States v. Vera*, 278 F.3d 672, 673 (7th Cir. 2002). That court has taken the same approach in the restitution context, *see United States v. George*, 403 F.3d 470, 473 (7th Cir. 2005), while recognizing that the question is "by no means settled," *United States v. Pree*, No. 03-1516, 2005 WL 1243357, at *15 n.20 (7th Cir. May 20, 2005).

At common law, forfeiture was either *in personam* (criminal) or *in rem* (civil). *United States v. Bajakajian*, 524 U.S. 321, 331-32, 118 S. Ct. 2028, 2035, 141 L. Ed. 2d 314, 327 (1998) (describing history of forfeiture). Although early forfeiture statutes in this country were of the *in rem*, civil variety, *see Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683, 94 S. Ct. 2080, 2091-92, 40 L. Ed. 2d 452, 468 (1974), modern criminal forfeiture – such as § 1963 forfeiture – is decidedly punitive in nature, *see Bajakajian*, 524 U.S. at 332 n.7 (expressly

(Continued on following page)

Therefore, the argument goes, any fact that increases the forfeiture amount is a fact that increases punishment; under *Blakely* and *Booker*, such facts must be found by a jury beyond a reasonable doubt.

Further examination, however, reveals several flaws in Braun's reasoning. As an initial matter, we observe that *Booker* itself expressly states that 18 U.S.C. § 3554 is still valid. *Booker*, 125 S. Ct. at 764 ("Most of the statute is perfectly valid." (citing specifically "§ 3554 (forfeiture)"). Section 3554 is the provision of the Sentencing Reform Act that requires the district court, when imposing a sentence on a defendant convicted under RICO, to order forfeiture in accordance with 18 U.S.C. § 1963, the RICO forfeiture provision at issue in this case. In other words, *Booker* itself suggests that a district court's forfeiture determination under § 1963 does not offend the Sixth Amendment.

More important, however, and ultimately fatal to Braun's argument, is the distinction between criminal forfeiture proceedings and determinate sentencing regimes. *Blakely* and *Booker* address determinate sentencing regimes. *See Blakely*, 542 U.S. ___, 124 S. Ct. at 2540 ("This case is . . . about how [determinate sentencing] can be implemented in a way that respects the Sixth Amendment."); *id.* at 2548-49 (O'Connor, J., dissenting) (warning that *Blakely*'s holding will affect all determinate sentencing regimes); *see also Booker*, 543 U.S. ___, 125 S. Ct. at 749-50 ("[T]here is no distinction of constitutional

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finding in Eighth Amendment context that RICO forfeiture is "punitive"); *Lizza Indus., Inc.*, 775 F.2d at 498 ("Forfeiture under RICO is a punitive, not a restitutive, measure."). If RICO forfeiture constitutes a criminal penalty, then the history of forfeiture as a civil remedy cannot alone justify a preponderance standard.

significance between the Federal Sentencing Guidelines and the Washington procedures at issue in [*Blakely*]."). In a determinate sentencing regime, a jury finds facts that support a conviction. That conviction, in turn, authorizes the imposition of a sentence within a specified range, established either by statute or administrative guideline, which we call a determinate sentence. Under *Booker*, a Sixth Amendment violation occurs when a judge increases the punishment beyond that range based upon facts not found by a jury beyond a reasonable doubt.[7]

Criminal forfeiture, by contrast, is *not* a determinate scheme. *See* 18 U.S.C. § 1963(a)(3) (providing that a defendant shall forfeit "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of [18 U.S.C. § 1962]). As the Seventh Circuit recently pointed out, criminal forfeiture is not subject to any statutory maximum:

> We have previously held that *Apprendi* has no effect on criminal forfeiture proceedings because forfeiture provisions have no statutory maximum. *Apprendi*'s statutory maximum was supplied by the statute of conviction; *Blakely*'s is external – the statutory maximum is found not in the criminal code, but instead, the sentencing

[7] In *Booker*, for example, the jury convicted Booker of possessing with intent to distribute at least 50 grams of crack cocaine. *Booker*, 543 U.S. ___, 125 S. Ct. at 746. That conviction – which established that Booker possessed 50 grams of crack – authorized a sentence between 210 and 262 months. *Id.* The judge, however, found, *inter alia*, that Booker had possessed an additional 566 grams of crack; these findings, made by a preponderance of the evidence under the previously mandatory Guidelines, mandated a sentence of 360 months to life imprisonment. *Id.*

> guidelines. The criminal forfeiture provisions do not include a statutory maximum; they are open-ended in that *all* property representing proceeds of illegal activity is subject to forfeiture.

United States v. Messino, 382 F.3d 704, 713 (7th Cir. 2004) (internal citations omitted, emphasis in original). In other words, *Blakely* and *Booker* prohibit a judicial increase in punishment beyond a previously specified range; in criminal forfeiture, there is no such previously specified range. A judge cannot exceed his constitutional authority by imposing a punishment beyond the statutory maximum if there is no statutory maximum. Criminal forfeiture is, simply put, a different animal from determinate sentencing.

In sum, Braun's Sixth Amendment argument must fail. We do not read *Booker* and *Blakely* to require proof beyond a reasonable doubt in indeterminate punishment schemes, such as RICO forfeiture. And, in any event, *Libretti* remains the determinative decision. Accordingly, the district court did not err when it applied a preponderance standard to the determination of Braun's forfeiture amount.

III. Review of the Forfeiture Amount

Under the preponderance standard, we find that the district court did not err when it ordered Braun to forfeit approximately $20.7 million. Braun, in essence, argues that the district court cannot use acquitted conduct as the basis for punishment. As an initial matter, we observe that the RICO forfeiture provision is broadly drafted and has long been liberally construed, *see Lizza Indus., Inc.*, 775 F.2d at 498, to reach all "proceeds" derived from racketeering

activity, 18 U.S.C. § 1963(a)(3). Although we have not previously considered whether proceeds derived from conduct forming the basis of a charge of which the defendant was acquitted can be counted as "proceeds" of racketeering activity, it seems plain that they can. *See, e.g., United States v. Genova*, 333 F.3d 750, 762 (7th Cir. 2003) ("The fact that Genova was acquitted of counts charging that he devoted the City's resources to his home-improvement projects does not eliminate all possibility of a forfeiture based on these activities."); *United States v. Edwards*, 303 F.3d 606, 643 (5th Cir. 2002). As the Fifth Circuit has explained, the defendant "is not being punished [under 18 U.S.C. § 1963(a)] for committing the substantive acts found to be 'not proven.' He is being punished for conducting the affairs of an enterprise through a pattern of racketeering activity." *Id.* So long as the sentencing court finds by a preponderance of the evidence that the criminal conduct through which the proceeds were made was foreseeable to the defendant, the proceeds should form part of the forfeiture judgment. *See id.* at 644 ("The only requirement is that the criminal conduct be foreseeable.").

In Braun's case, the district court correctly found that Braun – as a one-third owner of API – was aware of the bulk of the racketeering proceeds that API received from its various Postal Service frauds as well as customer fraud. Indeed, the court took care to exclude from the forfeiture amount any proceeds resulting from conduct of which Braun – as the government conceded – was not aware and had no reason to be aware. If Braun were aware of the scope of the racketeering enterprise, its proceeds were necessarily foreseeable to him. Because each conspirator is jointly and severally liable for all

proceeds foreseeably derived from the racketeering activity charged in the indictment, *United States v. Corrado*, 227 F.3d 543, 554-58 (6th Cir. 2000), the forfeiture amount was proper.

For the foregoing reasons, we hold that the district court's imposition of criminal forfeiture on Braun did not violate the Sixth Amendment and that it committed no error in calculating the forfeiture amount.

CONCLUSION

As set forth in a separate summary order issued today, we AFFIRM in all other respects the convictions of all defendants-appellants. The judgment of the district court is hereby AFFIRMED and the case is REMANDED for further proceedings consistent with *Booker* and *Crosby*.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Jun. 14, 2005)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 14th day of June, two thousand and five.

PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. Barrington D. Parker, Jr.,
Hon. Richard C. Wesley,
Circuit Judges.

- -x

UNITED STATES OF AMERICA,

Appellee,

v.

PHILIP FRUCHTER,* LAWRENCE BRAUN, DAUDA YAGUE, MAMADOU SYLLA, SAMBA WILLIAM and FRANK SINGH,

Defendants-Appellants,

STEVEN FRUCHTER, MITCHELL GRAND, MIGUEL MERCEDES and MUNINAUTH PULCHAN,

Defendants.

Nos. 02-1422 (L)
02-1451 (CON)
02-1474 (CON)
02-1542 (CON)
02-1552 (CON)
02-1561 (CON)

- -x

APPEARING FOR APPELLANTS:

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DANIEL NOBLE, New York, NY, *for Samba William*

ARTHUR J. VIVIANI, New York, NY, *for Frank Singh*

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* Appellant Philip Fruchter withdrew his appeal with prejudice prior to briefing and oral argument, pursuant to Fed. R. App. P. 42(b).

APPEARING FOR APPELLEE: **ROBIN W. MOREY, Assistant United States Attorney (David N. Kelley, United States Attorney for the Southern District of New York; Sarah Lai, Barbara A. Ward, Laura Grossfield Birger, and Gary Stein, Assistant United States Attorneys, *on the brief*), New York, NY**

Appeal from the United States District Court for the Southern District of New York (Michael B. Mukasey, *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said district court be and it hereby is **AFFIRMED.**

Defendant-appellants appeal their convictions, following an eleven-week jury trial, for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, the federal mail fraud statute, 18 U.S.C. § 1341, and the federal conspiracy statute, 18 U.S.C. § 371. We have issued today an opinion that addresses and rejects appellant Braun's claim under *Blakely v. Washington*, 542 U.S.___, 124 S. Ct. 2531 (2004), and *United States v. Booker*, 543 U.S.___, 125 S. Ct. 738 (2005), that the district court's criminal forfeiture order violated the Sixth Amendment. We address in this summary order appellants' other contentions. Familiarity with the facts and procedural background is presumed.

Principal among appellants' claims on appeal is that the prosecution's introduction into evidence of the plea

allocution of co-defendant Steven Fruchter, who pled guilty mid-way through trial, violated the rule announced in *Crawford v. Washington*, 541 U.S. 36 (2004), a case that was decided after defendants were convicted. Because it is unclear from the record whether appellants preserved their Confrontation Clause claim, we review under the relatively more lenient harmless-error standard. *See, e.g., United States v. McClain*, 377 F.3d 219, 222 (2d Cir. 2004). The Government concedes that the introduction of the allocution was error, but maintains that the error was harmless. *See e.g., id.; see also Coy v. Iowa*, 487 U.S. 1012, 1021 (1988) (denial of face-to-face confrontation subject to harmless error analysis). We agree with the Government. The substance of the allocution was cumulative of other evidence that had been presented at trial and was fully corroborated. Moreover, the plea allocution was admitted only to show the existence of the conspiracy, a fact that was not seriously contested by anyone and was supported by an overwhelming body of other evidence. Accordingly, the error was "harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

Appellant Braun also challenges the sufficiency of the Government's evidence against him as to (1) his conviction for mail fraud against API's customers, (2) his convictions for RICO and general conspiracy, and (3) his role in "operat[ing] or manag[ing]" a racketeering enterprise. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). Braun fails to meet the "very heavy burden" imposed on insufficiency claims. *United States v. Desena*, 287 F.3d 170, 177 (2d Cir. 2002). The jury was entitled to infer (1) that Taylor and Braun's discussion of throttling in the context of cost-savings meant that Braun was aware of the illegal throttling occurring at API, and (2) that Braun was aware that

the significant delays in completion of yellow sheets, of which he complained, was due to illegitimate activity. As to the RICO and general conspiracy convictions, the jury was also entitled to infer from Braun's central role in the management of API's finances, and from the fact that he reaped a third of API's profits, that Braun did more than merely associate with conspirators under suspicious circumstances. Finally, as to Braun's role in API's activities, the jury was entitled to find that it rose to the level of "operation or management." *Reves*, 507 U.S. at 179. As chief financial officer, for example, Braun supervised the billing of customers and the underpayment of the Postal Service and advised Taylor about how he should record bribes. Accordingly, we reject Braun's sufficiency claims.

We find similarly unavailing appellant Singh's sufficiency claims. The evidence presented at trial was sufficient to prove that Singh was (1) aware of the general thrust of the RICO conspiracy, and (2) an operator or manager of the RICO enterprise. Specifically, Singh conceded that he was involved in the bundling and burying activities at API, and the evidence at trial showed that he helped direct those activities. The evidence at trial also showed that Singh was aware of other schemes, such as illegal throttling, intended to defraud the Postal Service. The jury was therefore entitled to conclude that he was guilty of RICO violations and RICO conspiracy.

We also reject appellant Sylla's sufficiency challenge to his RICO conviction. Sylla not only supervised bundling and burying activities at API, but also had responsibility for throttling decisions and devised the "dropping-counts" scheme that API implemented following reclassification. Accordingly, the jury was entitled to find that he satisfied the *Reves* test and had violated 18 U.S.C. § 1962.

Appellants also contend that the Government's comments about Steven Fruchter's plea allocution and *Yague's* post-arrest confession during summation constituted prosecutorial misconduct. We disagree. We see nothing improper in the prosecutor's closing remarks, and certainly nothing "so severe and significant as to result in the denial of [the defendants'] right to a fair trial." *United States v. Locascio*, 6 F.3d 924, 945 (2d Cir. 1993).

Appellant Yague also argues that the district court committed reversible error when it denied his motion to suppress a confession he made in the wake of his arrest, after he had been given his *Miranda* warnings. We disagree. The district court properly found that no police overreaching or misconduct occurred during Yague's interrogation and that, in the absence of coercion, the statement was not involuntary. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *see also United States v. Cristobal*, 293 F.3d 134, 141 (4th Cir. 2002); *United States v. Genao*, 281 F.3d 305, 310 (1st Cir. 2002).

Appellant William argues that the prosecutor's inadvertent failure to turn over a handwritten note that he had scribbled during a short telephone conversation with Leonard Taylor, the Government's star witness, violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500. We agree with the district court's conclusion that nothing in the note contradicted or even undermined the Government's proof against William or its theory of the case. Moreover, even if the contents of the note could be considered exculpatory, there is no reasonable possibility that its disclosure would have changed the outcome of the trial. *See Strickler v. Greene*, 527 U.S. 263, 281, 289 (1999); *In re United States (United States v. Coppa)*, 267 F.3d 132, 135 (2d Cir. 2001).

Appellant Braun also challenges the district court's forfeiture order on a number of grounds. We address his Sixth Amendment claim in a separate published opinion issued today. Here we address (1) his argument that he should have been given credit for the federal income tax he paid on money received from the racketeering activity, and (2) his Eighth Amendment claim. The first argument is untenable under this court's previous holding that gross profits are forfeitable. *See United States v. Lizza Indus., Inc.*, 775 F.2d 492 (2d Cir. 1985). The second argument is similarly unpersuasive. The approximately $20.7 million forfeiture amount accurately represented the gains received by Braun and his cohorts from their racketeering activity and is thus distinguishable from *United States v. Bajakajian*, 524 U.S. 321, 337-41 (1998), in which the harm caused was minimal compared to the forfeiture sought. We likewise find unconvincing Braun's contention that because the Fruchter brothers' negotiated settlements with the Government make Braun solely liable for at least $10 million, the forfeiture order violates the Eighth Amendment. As long as joint and several liability remains constitutional under the Eighth Amendment, the forfeiture order remains proper.

Finally, appellants challenge their sentences. Appellant Braun argues (1) that the district court improperly held him accountable – under the "relevant conduct" provisions of the Guidelines – for acquitted conduct; (2) that the district court's loss calculation was in error; and (3) that the district court's enhancement for managerial role was improper. Appellant William argues that the district court (1) failed to make "particularized" findings concerning the scope of William's agreement and the losses foreseeable to him, pursuant to *United States v. Studley*,

47 F.3d 569, 574 (2d Cir. 1995), and *United States v. Mulder*, 273 F.3d 91, 118 (2d Cir. 2001); and (2) erred in calculating the loss amounts. In addition, following the Supreme Court's decision in *Blakely v. Washington*, which was decided shortly after oral argument, appellants filed supplemental briefs arguing that their sentences violated the Sixth Amendment because they were enhanced based upon facts not proven to the jury beyond a reasonable doubt.

We affirm the district court's sentencing calculations under the Guidelines, but in view of *Booker*, remand to the district court for further proceedings consistent with *Booker* and *United States v. Crosby*, 397 F.3d 103, 119-20 (2d Cir. 2005). In doing so, we make the following observations. First, under the Guidelines, the district court was entitled to consider acquitted conduct as relevant conduct. *United States v. Watts*, 519 U.S. 148, 157 (1997). Moreover, even in the post-*Booker* regime, the sentencing court's consideration of acquitted conduct is not in itself a violation of the Sixth Amendment – even if such consideration is in tension with the jury's verdict – so long as it does not "support any mandatory calculation," or "violate any of the judge's obligations to consider relevant factors." *United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005); *see also United States v. Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005). *But see United States v. Pimental*, ___ F. Supp. 2d ___, 2005 WL 958245, at *5-8 (D. Mass. Apr. 21, 2005) (concluding that *Booker* undermines *Watts* and accordingly refusing to consider acquitted conduct in sentencing). Second, given that the Guidelines "do not require that the sentencing court calculate the amount of loss with certainty or precision," *United States v. Bryant*, 128 F.3d 74, 75 (2d Cir. 1997) (per curiam), we find no error in the

district court's loss determinations as to both Braun and William, particularly in light of the fact that the district court granted Braun a two-level downward departure to account for any inaccuracies. Third, the evidence at trial amply supported the three-level managerial role enhancement imposed on Braun. Fourth, although the district court did not make the particularized findings that we have suggested are required before the district court can properly impose an adjustment for relevant conduct, *see Mulder*, 273 F.3d at 118; *Studley*, 47 F.3d at 574, any error committed does not rise to the level of plain error. Because William did not object to the lack of specific findings below, we review for plain error. *See United States v. Molina*, 356 F.3d 269, 277 (2d Cir. 2004). Where, as here, there was substantial evidence in the record to sustain the upward loss adjustment, and where the *Studley* issue was argued at length below, the court's failure to make particularized findings on the record was harmless.

We have considered all of appellants' contentions and find them to be without merit. For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED.** However, the case is **REMANDED** for further proceedings consistent with *Booker* and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

Any appeal taken from the district court's decision on remand can be initiated only by filing a new notice of appeal. *See* Fed. R. App. P. 3, 4(b). A party will not waive

or forfeit any appropriate argument on remand or on any appeal post-remand by not filing a petition for rehearing of this remand order.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr
Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

PHILIP FRUCHTER, a/k/a "Philip Foster," a/k/a "Philip Forster," LAURENCE BRAUN, DAUDA YAGUE, a/k/a "Chiek," MAMADOU SYLLA, MIGUEL MERCEDES, SAMBA WILLIAM, MUNINAUTH PULCHAN, a/k/a "Ramish," and FRANK SINGH,

Defendants.

S2R 99 Cr. 366 (MBM)

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New York, N.Y.
May 21, 2002
10:05 a.m.

Before:

HON. MICHAEL B. MUKASEY,

Chief Judge

* * *

[2] THE COURT: We are in open court. Those defendants who were convicted after trial have submitted post-trial motions to set aside the verdict and the government has submitted a motion for a RICO assessment

against Mr. Braun and this is the decision on those motions.

[3] After an 11-week trial, defendants Philip Fruchter, Lawrence Braun, Samba William and Frank Singh were convicted of a charges [sic] under the RICO statute and related conspiracy and mail fraud charges, growing out of their activities while employed by American Presort, Inc., which I will refer to as API, a company engaged in the business of sorting mail by Zip Code so as to qualify that mail for reduced postage rates. All were convicted on Counts 1 and 2, charging RICO and RICO conspiracy violations. William and Singh were convicted as well on Counts 3 and 4, charging conspiracy and mail fraud against the Postal Service, and of racketeering acts charging mail fraud against the Postal Service. Fruchter was convicted of racketeering acts 35 and 56, charging commercial bribery of API customer. Here, I should mention that the reference to particular racketeering acts is to those acts as renumbered following my dismissal of certain acts at the close of the government's case. Fruchter was convicted on Count 29 as well charging mail fraud against API customers. Braun was convicted of conspiracy and mail fraud on Counts 2 and 29 and was convicted of racketeering acts 24 through 34, involving mail fraud on customers of API. As to him, the jury hung on Count 16, charging fraudulent misuse of a postage meter.

Fruchter and Braun move for judgments of acquittal on all counts of which they were convicted, arguing the evidence was insufficient to convict them. Fruchter moves as well for [4] a new trial based on alleged errors during trial. Singh moves for a new trial on Counts 1 and 2 arguing the evidence was insufficient to convict him of those counts. William moves for a new trial based on the

government's alleged failure to disclose evidence. Defendants are considered to be joining in one another's motions to the extent relevant.

For reasons I will explain, the motions are denied.

In addition, the government has moved for a preliminary order of forfeiture against Braun, who disputes the amount of the forfeiture to the extent that it exceeds $748,707. For the reasons I will explain, I believe that the government's calculation of $20,717,960 is a reasonable assessment of the damages inflicted by the enterprise proved in this case, of which Braun had knowledge. Braun will be jointly and severally liable, with the Fruchter brothers, for that amount, except to the extent that the parties may agree on some other figure.

For purposes of this opinion, familiarity with much of the background at API and with the particular tasks performed by each defendant will be assumed, except when notably relevant to issues of sufficiency of evidence.

With respect to Fruchter, as to racketeering act 36, which charged commercial bribery of First Chicago, John Edwards, whose responsibilities included reviewing and verifying the accuracy of API bills, testified that after he [5] noticed that there was no back-up for certain charges on the First Chicago bill, Philip Fruchter started paying him visits on a weekly or biweekly basis and paying him amounts ranging from $100 to $200 and expressing his gratitude. In return, he approved the bills even when he noticed discrepancies that were to First Chicago's gains (Tr. 4162-65). He testified that when he had a new supervisor, he told Philip Fruchter that API should exercise care in the billing, and thereafter he received another payment from Fruchter (Tr. 4168, 4172).

Edwards' testimony was corroborated by both testimonial and documentary evidence. Leonard Taylor, a former API employee who pleaded guilty and was himself aware of and for the most part involved in all of the multifaceted frauds committed at API, testified that First Chicago's bills were inflated by raising the figures stating the weight of its international mail. (Tr. 2230-311), and that Philip Fruchter would regularly ask for petty cash money to give to Edwards, (Tr. 2200-02, 2205-07). That testimony was corroborated by the petty cash records themselves, showing entries for money given to Philip Fruchter for "Edwards" (GX49), by Taylor's diary, (GX46) and by the so-called "yellow sheets" maintained at API, (GX34, 35) which were the documents on which the inflated figures to be billed to customers were recorded at API, (Tr. 2081-89, 2125-35), other than for those customers who demanded back-up sheets, as to which inflated back-up [6] sheets were prepared, (Tr. 2089). Taylor's testimony was corroborated, in turn, by the testimony of Manuel Kaplan, who confirmed that the yellow sheets were vehicles for inflating bills. (Tr. 4509-15). Taylor testified to his understanding that the payments were uncritical approval of fraudulent bills, (Tr. 2232), that there may have been other reasons also for the payments, or that Philip Fruchter may not have said explicitly to Edwards that payments were being made in return for permitting First Chicago to be defrauded, is irrelevant. *See Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979), noting that the prosecution is not obligated "to rule out every hypothesis except that of guilt beyond a reasonable doubt." Rather, the standard is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* That decision was for the jury, and the government at this stage of the proceedings is entitled to

have all reasons [sic] inferences drawn in favor of sustaining a guilty verdict. It is certainly reasonable for a jury to have inferred from the evidence summarized above that Philip Fruchter paid commercial bribes, and that the recipient of those bribes well understood that at least one of the purposes of those bribes was to permit First Chicago to pay more than it should have for postage.

Nor is it reasonable to argue, as Fruchter does, that the evidence was insufficient to support an inference that [7] First Chicago was defrauded at least in the amount of $250. Taylor testified to regular inflation of the weight of First Chicago foreign mail (Tr. 2230-31). This occurred over an extended period of time. (GX30-I). Further, the parties stipulated to the applicable rate for the Jersey City branch of First Chicago, (LT-PF20A; Tr. 5636). A postal inspector testified that he had analyzed bills from API to First Chicago in light of what should have been the applicable rates and that those bills reflected overcharges exceeding $50,000 for the period of July 1995 through June 1997 (Tr. 5633-36; GX126, 126A), the same period in which Fruchter was paying Edwards. (Tr. 5632-33; GX30-I). Again, that there was contrary evidence is irrelevant. In particular, it is irrelevant that Edwards testified that he thought First Chicago saved money with API, presumably as compared to what it would have paid had all its mail been sent at first class rates with no discount, or whether he was unaware of losses. The issue is not what First Chicago saved but what it should have saved that is crucial. Giving the government the benefit of all the reasonable inferences, as I am obligated to do at this stage, it's reasonable to conclude from the evidence just described that First Chicago was damaged at least in the amount of $250 and that that damage resulted at least in

part from the payments Fruchter made to Edwards. That testimony, coupled with the evidence of his payments to Rocco Casamassima [8] of Paine Webber, were sufficient to establish the two racketeering acts the jury found, as required by the statute.

Fruchter argues also that the evidence was insufficient to show that he conducted the affairs of API within the meaning of the RICO statute, i.e., that he had "*some* part in directing the enterprise's affairs." *Reves* v. *Ernst & Young*, 507 U.S. 170, 179 (1983). However, Philip Fruchter, his brother Steven and Lawrence Braun were the owners of API and shared its profits. They were certainly the principal beneficiaries of the many and varied frauds perpetrated at API. Philip Fruchter's principal function was customer relations both in recruiting new customers and in retaining existing ones. (Tr. 2076, 4011) Even with respect to new customers, the fraud had its impact. The evidence showed that Philip Fruchter would bring customers to the plant for tours but avoided doing so while the activity referred to at trial as burying and bundling was going on. In particular, the evidence justified the jury in finding that Philip Fruchter orchestrated the effort to beguile customers who challenged their fraudulent bills. Taylor testified to one occasion when NatWest employee Al Sachse questioned certain amounts on a bill, and Taylor told Philip Fruchter that the amounts in question had come from Steven Fruchter's yellow sheets. Philip Fruchter, without expressing any unawareness of what yellow sheets were, said he would take the matter up [9] with his brother, and then later told Taylor to tell Sachse that the amounts in question reflected how NatWest's mail actually qualified for certain postal rates, but that API would try to do better. (Tr. 2071-73) He told Taylor in more

general terms how to respond to customers who seemed inclined to challenge their bills. (Tr. 2074-75) Mitchell Grand testified to numerous meetings and conversations in which Philip Fruchter instructed him to lie to customers about the rate at which their mail qualified for postal discounts, which sometimes involved heroic efforts at deception by Grand, who so informed Philip Fruchter. (Tr. 4016-19, 4055-57)

That is more than enough to establish that Philip Fruchter conducted the affairs of the enterprise within the meaning of *Reves* v. *Ernst & Young supra*. *See Napoli* v. *United States* 45 F.3d 680, 683 (2d Cir. 1995), (exercise of broad discretion by investigator who instructed witnesses to lie at the direction of an attorney who had overall supervision is sufficient).

Fruchter asserts also that if either of the racketeering acts of which he was convicted is stricken, then his conviction for RICO conspiracy would fall along with his substantive conviction for racketeering. However, all that is needed to prove a RICO conspiracy is agreement to conduct the affairs of an enterprise through a pattern of racketeering activity; no actual participation in action of racketeering is [10] necessary. *See Salinas* v. *United States*, 522 U.S. 52, 53-54 (1997). On the evidence presented at trial, including the evidence pertaining not only to counts of conviction but also to counts and racketeering acts of which Fruchter was acquitted, *See United States* v. *Powell*, 469 U.S. 57, 67 (1984), there is no doubt that the evidence supports a finding of such an agreement. As the Court said in Powell, "Sufficiency of the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [citations omitted]

This review should be independent of the jury's determination that evidence on another count was insufficient." *Id.* *See also*, *United States* v. *Urbistando*, 98 Cr. 566, 1999 Westlaw 61823 at * 2, (S.D.N.Y. Feb. 10, 1999), *aff'd mem.* 201 F.3d 433 (2d Cir. 1999) (considering evidence on count of murder, of which defendant was acquitted in connection with sufficiency claim addressed to weapons and conspiracy counts that were subject to conviction). This is true because, as Judge Friendly wrote in *United States* v. *Taylor*, 464 F.2d 240, 244 (2d Cir. 1972) "any fact may gain color from others." Moreover, "[u]nder our jurisprudence, a verdict of 'not guilty' is not the equivalent of a finding of 'innocent'" *United States* v. *Accosta*, 17 F.3d, 538, 544, (2d Cir. 1994) (rejecting a claim that allegedly inconsistent verdicts required acquittal). In addition to the evidence set [11] forth above, there was testimony reflecting that Philip Fruchter attended a meeting after postal inspectors had searched the premises of API and it appeared that the proverbial jig was up, and suggested that those in attendance – the three owners and Leonard Taylor – perhaps should hold their next meeting at a sauna. (Tr. 2293-94) a mordant comment that reflected his keen awareness of the criminality at API. All such evidence is sufficient to establish Philip Fruchter's agreement to conduct the affairs of API through a pattern of racketeering activity.

Philip Fruchter's challenge to his conviction under Count 29, charging mail fraud on API's customers, is initially any more persuasive, but ultimately no more successful. He argues that there is no evidence showing he was aware of mail fraud committed against the seven particular customers covered by Count 29, as specified in post-indictment disclosures – Aetna, Lucent Technologies, Passack Valley Hospital, Montefiore Hospital, Memorial-Sloan

Kettering Institute, Mount Sinai Medical Center and the Staten Island Advance. Here, Fruchter does not argue that they were not defrauded, but rather that there was no evidence showing that he had knowledge of the fraud committed against them. However, neither does the government argue that there was any specific evidence showing that Philip Fruchter was aware of the fraud committed on any of the seven named victims. Rather, the [12] government argues that the evidence was sufficient to show that Philip Fruchter was principally responsible for customer relations, including responsibility for helping resolve billing disputes. The evidence was certainly sufficient to show that. The government cites further the evidence that showed that Philip Fruchter was familiar with the use of the yellow sheets as the vehicle for inflating customer bills. As noted earlier, the evidence showed that familiarity. The government reasons from such evidence that it was reasonable for the jury to find beyond a reasonable doubt that Philip Fruchter was aware of which were the specific API customers who had their mail metered at API, and who were the victims of such inflated bills, either through the yellow sheets, or, in the case of Aetna, through fraudulent back-up sheets. (Gov't mem. p. 27). However, there is simply no process of inference – that is logical deduction – as opposed to speculation that could lead the jury to that conclusion beyond a reasonable doubt. The customers who had their mail metered at API, and thus were the targets of the fraud charged in Count 29, numbered between 35 and 40. (Tr. 2088) and constituted at most ten percent of API's customers (Tr. 1756). Although, as noted above, Grand testified to numerous conversations with Philip Fruchter about dealing with customers who complained about bills, he did not specify any of the particular victims who were the subject of

Count 29. [13] The specific victim he testified about was NatWest, which is not among the victims covered by Count 29.

Nonetheless, the government's theory is not the only one on which the jury could have returned a guilty verdict, nor is it in my estimation the most likely theory. In addition to being instructed generally on the concept of criminal knowledge, the jury was instructed also on the concept of conscious avoidance, and that it could find the requisite degree of knowledge if it found the defendant was aware of a high probability of criminal conduct and consciously avoided becoming certain of what was highly probable. The jury was cautioned, however, that it could not find participation through *conscious* avoidance. (Tr. 6938-39, 6951-52) In view of the proof that Philip Fruchter was aware of the use of yellow sheets, was aware of inflated bills, and was aware in particular at least of the fraud on NatWest, the jury could easily have found that he was a willing participant in a conspiracy to defraud customers who had their mail metered at API but simply avoided *knowing* each particular target of the generalized fraud on that category of customers by closing his eyes until he was forced to confront that particular detail in response to a complaint.

Although the jury was charged that they could convict based on proof that a defendant had knowledge of the scheme to defraud a particular victim (Tr. 6981), they could have found [14] such knowledge of particular victims based on conscious avoidance, given the level of Philip Fruchter's knowledge outlined above. Because the evidence justified the jury verdict on Count 29 based on a conscious avoidance theory, the motion to dismiss that count is denied.

Philip Fruchter also presses claims of trial error, including errors in the exclusion and receipt of evidence and in the jury charge, and improprieties in the government's rebuttal summation. He argues that it was error to exclude extrinsic evidence that Rocco Casamassima, a Paine Webber employee to whom the jury found paid bribes in return for overlooking fraudulent invoices to Paine Webber, as charged in racketeering act 35, had extorted payments from another mail sorting company, J&H. He claims that excluding such evidence prevented him from presenting a defense to this racketeering act. There are two answers to this extravagant claim. The first is that although Fruchter's counsel wafted before the jury at one point in his summation the possibility that Casamassima was shaking Fruchter down (Tr. 5632), and elicited at one point during his cross-examination that he – Casamassima – had told postal agents that Philip Fruchter had begged him not to cut off business from API (Tr. 4452), his principal approach with Casamassima was the same as his approach with Edwards. That approach was to suggest reasons other than overlooking fraudulent invoices why money was paid, [15] including increasing business. (Tr. 4425-28, 4443, 4451-52, 4456), and overlooking other problems (Tr. 4426-28, 4443), and to stress that Casamassima had dealt with others at API (Tr. 4421, 4427-29, 4016-18). This approach was carried into his summation (Tr. 6709-10, 6729-36, 6733-43). Which is to say, as I noted at the trial, his principal position was that there was no quid pro quo. (Tr. 4466)

But further, the evidence Fruchter offered – of extrinsic proof that Casamassima had extorted J&H – was completely inadmissible. First, to the extent that Fruchter wanted to argue that because Casamassima extorted J&H he was more likely to have extorted API, Rule 404(b)

squarely bars that argument by making proof of past wrongs inadmissible to prove the character of a person to show that he acted in conformity with it on a later occasion. Second, to the extent that he wanted to impeach Casamassima's credibility with extrinsic proof of a bad act, such proof is inadmissible. Third, whatever gossamer relevance the proof might have had would have been completely outweighed by the prejudice and delay of trying an extortion case within a case that was already ponderous enough, a balance that Rule 403 recognizes and validates – or as I said at the time, there would not be a "trial within a trial on the question of whether there was or was not extortion [at J&H]." As the government correctly argues, the closest analogous case, if case law is needed in [16] addition to rules and logic, is not any of the cases cited in Fruchter's brief, but rather *United States* v. *Aboumoussalem*, 726 F.2d 906, 910-11 (2d Cir. 1984), where a defendant who was charged with importing narcotics into the United States defended on the ground that he had been duped, and offered to prove that on a prior occasion his alleged co-conspirators had duped someone else into transporting narcotics. The Court of Appeals found the trial court completely justified in excluding the evidence based on its limited probative value. Third, absent any proof from any source that Casamassima had extorted Fruchter, and in view of the inconsistency between Fruchter's principal line of defense and the defense of extortion, the proffered evidence was irrelevant. It appeared to me then, and still does, that the evidence was offered simply to soil Casamassima even further than his own testimony did, a redundancy in view of Fruchter's exploration of Casamassima's arrest on extortion charges and other blots on Casamassima's

record. There is simply no substance to the claim that the proffered evidence went to the heart of Fruchter's defense.

Fruchter argues that his brother's guilty plea was improperly received in evidence. He is incorrect. The plea was admissible pursuant to well-established circuit authority, when sufficient indicia of reliability were found, as they were in this case. To the extent that he argues that Steven [17] Fruchter's plea to participating in a racketeering enterprise that included as one of its goals commercial bribery necessarily pointed the finger at him, he is incorrect, and the plea allocution would have been admissible even if he were correct. Leonard Taylor testified that he too paid commercial bribes, (Tr. 2205-06) But even if he had not and Philip Fruchter was the only other person to whom Steven Fruchter's statements about commercial bribery could have applied, those statements nonetheless would have been admissible. *See United States* v. *Moskowitz*, 215 F.3d 265, 269 (2d Cir. 1999).

Fruchter asserts that the jury instructions on the element of the racketeering and RICO conspiracy charges in Counts 1 and 2 would have permitted the jury to convict based solely on a finding that Fruchter was employed by the enterprise API. This assertion is based on omitting portions of the charge on both counts that were actually given, and suggests that the jury would have applied a portion of the charge on Count 2 – the RICO conspiracy charge – to Count 1, without also applying the charge as given on Count 1. That is simply absurd. The jury was told, as to Count 1, that the five elements of racketeering included engaging in a pattern of racketeering activity and conduct of the enterprise through a pattern of racketeering activity. (Tr. 6940-41) The pattern requirement was defined in language to which I do not understand Fruchter to

take exception at pages 6943-6945, [18] including the commission of two racketeering acts that were part of the pattern, and the jury was told: "If you find that the fourth element has been satisfied by proof that the defendant you are considering engaged in a pattern of racketeering acts, then you must determine whether, in committing those racketeering acts, the defendant was conducting or participating in the conduct of the enterprise." (Tr. 6945) Which is to say, the jury could not have convicted anyone on Count 1 based only on a finding that he was employed by the enterprise. As to Count 2 the jury was told that the conspiracy charged was "to participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity." (Tr. 6964) The jury was then told that in order to convict, they would have to find that the defendant "agreed to participate, directly or indirectly, in the affairs of the enterprise through a pattern of racketeering activity." (Tr. 6966) How a jury could convict on either count based simply on a finding that a defendant was employed by API "in its legitimate work" (Fruchter memorandum page 44) is a mystery to me, particularly when one considers that the jury was also told that it was not to take any one part of the charge out of context but was to consider the charge as an integrated statement, an instruction the jury received not once but twice. (Tr. 6928, 7015) Jurors are presumed to follow instructions.

[19] No more persuasive is Fruchter's argument that the government, through Assistant Attorney Robin Abrams, improperly argued the significance of Steven Fruchter's guilty plea allocution and Dauda Yague's post-arrest statements in its rebuttal summation. He is wrong on both counts. So far as the government's use of Steven

Fruchter's plea allocution in summation, that use was entirely permissible. The plea was admissible to prove that the conspiracy and scheme charged in the indictment existed, and what Steven Fruchter had done to promote that conspiracy and scheme, and the jury was so instructed, again not once, but twice. (Tr. 5702-00, 7006-08) After Leonard Taylor's testimony had been attacked in virtually all defense summations as self-serving perjury government counsel rose in rebuttal and pointed to various kinds of evidence that corroborated Leonard Taylor's testimony on numerous points, including the submission of altered numbers on qualification reports. This corroboration included documentary evidence and the testimony of other witnesses such as David Sam, Mitchell Grand, Claudia Pearce and Richard Harlin. (See Tr. 6786-6789) She noted also that "Steven Fruchter told you in his plea allocution, I allowed qualification reports to be altered in a manner that caused the United States Post Office to be defrauded by falsely representing that the mail qualified for the true amount for postage discounts." (Tr. 6789) That, virtually to a word, is [20] what the allocution of Steven Fruchter said. (Compare, Tr. 5701-02) The same pattern was followed with respect to Taylor's testimony about postage meter fraud, as to which government counsel cited documentary evidence, other witnesses, and the allocution of Steven Fruchter in which he said he allowed a postage meeter to be used to generate postage that was not being paid for. Again, that is what Steven Fruchter said he had done. (Compare Tr. 5701-02 with Tr. 6792) Government counsel used the same argument with respect to bribery of postal employees and commercial bribery of customers, citing documentary evidence, the testimony of other witnesses, and the guilty plea of Steven Fruchter, in which she said, Steven Fruchter had admitted the following, "I

approve[d] the payment of bribes to postal employees so they would not fully enforce various postal regulations when inspecting American Presort's mail. I approved the commercial bribery of various American Presort customers so they would not fully inspect the bills or the overcharges on the bills." (Tr. 6793) Again, that was virtually word for word what Steven Fruchter said during the plea. (Compare Tr. 5701-02)

It was not improper for government counsel to note that what Steven Fruchter said he had allowed was precisely what Leonard Taylor said he and others had done. Notably, at no time did government counsel even suggest that Steven Fruchter's plea allocution tended to show that any particular [21] defendant on trial was guilty. However, it was perfectly proper for her to make arguments tending to support the conclusion that if Leonard Taylor should be believed when he described the kinds of criminality that had gone on at API based in part on the plea allocution of Steven Fruchter, then he should be believed as well when he said particular defendants on trial were involved in that criminality.

The same is true with respect to use of Dauda Yague's post-arrest admissions. At trial, postal inspector Joseph McGinley testified that after Yague was arrested he admitted he had engaged in a variety of criminal conduct while at API including burying and bundling of improperly sorted mail, altering qualification reports to show that mail sorted at API was bar coded to the extent necessary to meet the Postal Service requirement for discount, bribing Postal Service employees, and submitting mailing statements to the Postal Service that undercounted the amount of mail being submitted. (Tr. 4878-94) At the time I told the jury that they could consider this statement to

show what Yague did or knew, but not what anyone else did or knew. (Tr. 4875)

Here again, in response to defense arguments that when certain government witnesses referred to throttling they may have been referring to the permissible kind of throttling that would allow one batch of mail with a high qualification rate to be combined with another so that the overall [22] qualification rate would be within permissible limits, and that the testimony of Leonard Taylor about the involvement of defendants in illegal throttling should not be believed, government counsel cited the testimony of Claudia Pearce, David Sam, Mitchell Grand and Richard Harlin, and the post-arrest statements of Cheik – Dauda Yague – that he was changing qualification reports for two years prior to reclassification to show that mail throttled at below the permissible 85 percent had actually qualified at 85 percent and above. (Tr. 6789) Government counsel made the same kinds of arguments with respect to Yague's statements about commercial bribery – that they along with other evidence, including testimony of Michael Desnoyers, Rocco Casamassima and John Edwards, and the guilty plea of Steven Fruchter – corroborated Leonard Taylor's testimony about commercial bribery activities at API. (Tr. 6793-94) As set forth above with respect to similar arguments as to the Steven Fruchter's guilty plea, those arguments were entirely proper. Here again, the prosecutor made no arguments suggesting that Yague's post-arrest statements had specific bearing on the guilt of any defendant other than Yague himself.

Lawrence Braun has challenged the sufficiency of the evidence to convict him on Counts 1, 23 and 29. Here, the testimony of Leonard Taylor virtually by itself is enough to sustain the conviction on each of those counts.

[23] Braun was a co-owner of the company with the Fruchter brothers, and was the officer in charge of all the company's financial functions. (Tr. 1789) He shared equally in the profits with the Fruchter brothers. (Tr. 5148) He and the two Fruchter brothers had to sign all checks over $1,000. (Tr. 1847-48) He took an intense interest in the financial operations of the company, calling in daily even when on vacation in foreign countries in other time zones and talking for half an hour or more at a time about such matters as how much money was coming in and what problems had been encountered. (Tr. 1829-31) He kept abreast of postal regulations, maintaining the domestic mail manual in his office and attending annually a forum on post office procedures. (Tr. 1832-34) Braun would review from time to time a board that listed daily production and residual postage costs. (Tr. 1910) He would maintain postage log recap reports by week and would enter the postage meter recaps in the general ledger. (Tr. 18341, 1911-14; GX39 series) Braun maintained the petty cash logs as well. When Braun was away, no one else took over responsibility for maintaining petty cash logs and postage log recaps. (Tr. 3074-75) From these records it is apparent that Braun was aware of the true costs to API of metering its customers' mails and also, as will be discussed below, of the disbursement of petty cash funds for bribes to both customer and postal employees.

[24] Braun designed the entire billing system for customers down to the form of the bills themselves and specified the calculations that went into formulating the bills. (Tr. 2064) As noted above, the yellow sheets were an important tool in the customer mail fraud activity that went on at API. Braun was aware as well of the use of the yellow sheets. As Taylor testified, Taylor at times would

provide to Rick Portuguese different percentages on a daily basis so that it would appear that the qualification numbers for customers' mail were true, rather than using the same numbers every day, whereas in fact he was simply plugging numbers. (Tr. 2058) Steven Fruchter did the same thing. (*Id.*) Taylor testified that he had several conversations in which Braun complained about the length of time it took to bill, and when Taylor told him that Rick Portuguese was waiting for Steven Fruchter to finish his yellow sheets, Braun did not inquire what yellow sheets were. (Tr. 2064-67) From that testimony, coupled with his actual knowledge of the postal expenses of API based on his intimate involvement in maintaining records of expenses, a jury was entitled to conclude that Braun participated in a billing process he knew defrauded API's customers. Whether there was testimony that he knew specifically about the customers alleged in Count 29 to have been defrauded is not relevant because, as was true with respect to Philip Fruchter, the jury was charged that they could find guilt if they find [25] that a defendant with awareness of a high probability of fraud had willfully avoided such direct or particular knowledge. There was ample evidence on which the jury could have relied, as set forth in part above, to infer that Braun had acted with awareness not merely with a high probability but rather of a certainty of fraud; if he avoided learning the identity of particular defrauded customers whose billing he supervised, such avoidance could only have been purposeful.

The testimony showed also that Braun participated in both the customer and Postal Service bribery aspects of the fraud at API. Taylor's testimony was that Philip Fruchter asked regularly for money to bribe Rocco Casamassima, (Tr. 2202-02), and that Braun told him to

list the payment under "warehouse expense." (Tr. 2202-04) The payments to Casamassima were in return for not questioning the bills. (Tr. 2209) He also reviewed petty cash logs and vouchers reflecting payments to postal employees, (Tr. 2184-85), and discussed with Taylor a payment to Michael Desnoyers and the category it would be charged to. (Tr. 3104-05) When told that Yague needed petty cash funds to bribe a Postal Service employee, Braun first asked whether this matter had been discussed with Steven Fruchter; when told that it had been, Braun directed that the payment be classified as "warehouse expense" (Tr. 2157-59) Indeed, at one point Braun complained to Taylor that he could not see why API had to pay "so much [26] graft" (Tr. 2232) A jury could have inferred from such conduct and such statements that Braun, one-third owner of API who ran the company's entire financial operation and supervised the collection of receivables agreed to and did conduct the affairs of API through a pattern of RICO fraud that included bribery of customers and Postal Service employees. This can support the verdict as to Count 2 charging such participation. *See United States* v. *Powell* and related cases, *supra*.

Further, the testimony showed that Braun was both aware of and a participant in the fraud perpetrated on the Postal Service through so-called burying and bundling. Taylor reported a conversation in late 1995 in which Braun, observing the number of people engaged in this activity, commented that it might be better – from which one might infer cheaper and more efficient – to simply sort the mail. (Tr. 1891) Before reclassification in 1995 and 1996, Braun raised questions with Taylor when postal costs seemed to him higher than normal, and was told that the increase had resulted from an inability to throttle. (Tr.

1953-54) From the context, it was plain that what was being referred to was illegal throttling, because the only way that throttling could affect postage costs at that time was if it resulted in disguising improperly sorted mail as properly sorted mail. (See Tr. 1950-53) When reclassification was instituted and 100% of API's mail had to [27] be bar coded, Braun expressed displeasure at the prospect of increased postage costs that would result from API's inability to throttle as had been done before. (Tr. 1962-63) Further, if, as shown above, Braun was aware of bribed Postal Service employees, then he was necessarily aware as well that those bribes were being paid so that those employees would overlook fraud in API's mailings. From these statements and actions the jury could infer that Braun – again, one-third owner of the business who ran the entire financial operation at API – was aware of the frauds being perpetrated on the Postal Service by false mailing statements before reclassification and by burying and bundling and assisted in the carrying out of those frauds by, at a minimum, condoning them as an owner and maintaining the financial system that permitted himself and the other conspirators to keep track of, to reap, and to divide their fraudulent gains on an ongoing basis.

The evidence showed that Braun was aware as well of the postage meter fraud that was committed at API through what was referred to at trial as the Hasler-6, the meter that generated postage without being reset by the Postal Service and thus without the Postal Service being reimbursed for that postage. Taylor testified that he told Braun about the Hasler-6 having "rolled over" and that Braun directed him to inform Steven Fruchter of that happy event, which he did. (Tr. 2011) Thereafter, he discussed the meter with Braun [28] again during the next

two or two and a half months because Braun wanted to get an idea of how much API was making as a result of the malfunctioning meter. (Tr. 2021) Again, this was not idle gossip for Braun, an owner of the company and the person in charge of its financial operations. This was information he needed so as to know how to keep track of money on an ongoing basis. This evidence justified the conclusion that postal meter fraud was another activity Braun had agreed to engage in, as charged in Count 2 and Count 3. That the jury hung on Count 16, charging Braun with the substantive crime of postage meter fraud, and that he was acquitted of racketeering acts that charged such fraud is irrelevant for the same reasons that such considerations were irrelevant as to Philip Fruchter. *See United States* v. *Powell,* and related cases above.

Based on the above evidence, and applying the standard set forward in *Jackson* v. *Virginia, supra,* the jury was justified in finding that Braun participated in the management of API through a pattern of racketeering activities, that he agreed to do so, and that he agreed to commit mail fraud, bribery, and postage meter fraud, and that he actually committed mail fraud as charged in the counts under which he was convicted.

Frank Singh, a production manager at API from 1994 to 1996, and then again in 1997 after a medical leave, (Tr. [30] 1796-97, 2999-3000), was convicted on Counts 1 through 4 and challenges his conviction on Counts 1 and 2, arguing that the evidence was not sufficient to show that he had the requisite knowledge to support a conviction on either counts [sic]. He has moved with respect to Counts 3 and 4 as well but has not set forth arguments relating to those counts. In any event, the evidence was sufficient to support the verdict on all counts. As to Count 1, the

racketeering count, the evidence showed that as a production manager, Singh had and exercised discretion to direct employees, including directing them in the concealment of unsorted mail referred to as burying and bundling. Taylor testified to that, (Tr. 1979, 1798, 1875, 1876, 1905); David Sam testified to it (Tr. 3774-75, 3778, 3783-85); Claudia Pearce testified to it (Tr. 3257-58). Moreover, there was evidence that Singh understood the purpose of this activity, and indeed that he taught others both the practice and its purpose. (Tr. 1877, 3779-80). That is enough to support convictions on Counts 1 and 2, the RICO counts.

It is enough also to support conviction on Count 3, the conspiracy count, which charged, among other things, an intent to defraud the Postal Service through use of the mails, and charged Singh in over act h [sic] in paragraph 12, with directing the concealment of letters, and on Count 4, which charged Singh, and others, with substantive mail fraud through [30] submission of letters not accounted for.

Samba William – like Singh, convicted on Counts 1 through 4 – argues that notes of a conversation between government counsel and Leonard Taylor, on the subject of David Sam and William's promotion at API, *which* notes were not turned over until after trial contain evidence inconsistent with the government's theory of the case against William. He argues that the failure to disclose those notes before or during trial violates *Brady* v. *Maryland,* 373 U.S. 83, (1963) and its progeny including *Giglio* v. *United States,* 405 U.S. 150 (1972) as well as 18 U.S.C. Section 3500 and he seeks a new trial pursuant to Federal Rule of Criminal Procedure 33. As I will explain briefly, the notes in question contain no information that tends to exculpate William or to attack in any significant way the credibility of any government witness. The notes contain

no information that is material to any issue at trial as materiality is understood in matters of this kind. Moreover, there is no indication that the failure to disclose the notes was anything but inadvertent. Therefore, there can have been no violation of either Brady or Giglio. Moreover, the notes are not statements within the meaning of Section 3500, and even if they were, any failure to turn them over was not only inadvertent but also insignificant. Therefore, the motion is denied.

The evidence against William at trial included [31] testimony by Taylor, Sam, Claudia Pearce, all to the effect that William was involved in various of the frauds at API, including the burying and bundling. (Tr. 1875, 1879, 1905, 1929, 1949, 3121, 3263-66, 3272-73, 3776), Taylor's testimony that Yague made the decision to promote William, (Tr. 1800), Sam's testimony that Yague's "people" got raises, (Tr. 3933-31, 3941), the documented increase in William's salary in 1996-97, (Tr. 3122-23), and Taylor's testimony that William said he knew how to alter the paperwork at API. (Tr. 3172) The government argued this evidence proved William had been deeply involved in the fraud at API, and that he had been promoted based on his willing participation in unlawful activity. Shortly after trial, government counsel found a page of notes of a telephone conversation between government counsel and Leonard Taylor, a principal witness for the government. That conversation concerned David Sam, who also testified for the government, and also mentioned William. The notes consist of sentence fragments suggesting that Taylor had said the following about Sam and William: (1) Sam had "expressed no dissatisfaction" to Taylor, presumably about the illegal activities in which he was required to engage at API; (2) Sam had "buried & bundled & altered

paperwork" at API; (3) Sam was "not demoted" at API but rather API had "created a position for Samba [William]" because "he [was a] better supervisor" – presumably better than David Sam – although [32] Sam was "probably still getting raises"; (4) Taylor thought Sam was a "poor manager," that he was "late in morning" and "couldn't keep track of employees." Noble affidavit Exhibit C.

William contends that the notes are inconsistent with the government's theory of the case against William. He contends that the government argued at trial that William had been promoted at API because of his willingness to engage in criminal activity and that David Sam had been demoted because he declined to do so. Based on those contentions he asserts that the notes mandate a new trial because they are exculpatory information that was withheld and they are statements of Taylor that contain material inconsistencies with Taylor's trial testimony and should have been turned over pursuant to 18 U.S.C. Section 3500.

The government's theory of the case against William was that he engaged in the acts described above – burying and bundling and alteration of paperwork – and that he had been rewarded for doing so including being promoted as [sic] the behest of Yague. The proof of such acts lay in the testimony of Taylor, Pearce and Sam. There is nothing in the notes that undercuts that proof. To the extent that the notes show that Sam had not complained to Taylor about illegal acts, that is not inconsistent with Taylor's testimony and Sam's at trial. Nor is there anything in the notes inconsistent with Sam's [33] testimony about his own career at API, which is in any event tangential to the issue of William's guilt. Sam said merely that the nature of his job had changed, albeit from supervision to maintenance, (Tr.

3761), not that he had been demoted. In any event, when measured in relation to the proof against William, these notes are insignificant.

In order to be considered Brady material, the notes must be favorable to William or contain favorable impeachment evidence. *United States* v. *Gonzalez*, 110 F.3d, 936, 943 (2d Cir. 1997). There is nothing in the notes that is favorable in the sense of exculpating William. That Taylor thought William was a better supervisor than Sam does not mean that William did not engage in criminal activities or make his way at API by doing so. The testimony was that Sam had been promoted by Yague, not by Taylor. Nor is it inconsistent with Sam's testimony that he apparently did not complain to Taylor about having to engage in criminal conduct. His testimony was that he explained to Steven Fruchter and was admonished by Steven Fruchter about the value of being a team player. Thus, the notes do not contain Brady or Giglio material.

In addition, the notes are not Section 3500 material, because they do not contain a "substantially verbatim recital" of the conversation between the prosecutor and Taylor, as the statute requires. 18 U.S.C. Section 3500(e)(2).

For those reason, William's motion for a new trial is [34] denied.

In addition, the government has moved for a preliminary order of forfeiture against Braun in the full amount of estimated racketeering proceeds to API, less the proceeds attributable to the Hasler 5 meter of which the government concedes that there is no evidence to show that Braun was specifically aware or had reason to be aware. Based on the evidence at trial and extrapolations

therefrom, the government estimates this amount to be slightly more than $20.7 million. Braun seeks to limit his exposure to approximately $748,000 attributable to the customer portion of the frauds committed at API – of which he was convicted – based on his having been acquitted of racketeering acts relating to fraud on the Postal Service and the jury's failure to reach a verdict on the postage meeting [sic] fraud charged in Count 16. He argues also to impose a greater forfeiture would violate the unreasonable fines clause of the Eighth Amendment and alternatively seeks a downward departure with respect to the amount of the forfeiture. For the reasons I will explain, the government's motion is granted to the extent of $230,717,960.

First, to the extent that Braun's argument suggests that acquitted conduct is somehow off the table for sentencing purposes, his position is at odds with *United States* v. *Watts*, 519 U.S. 148, 156 (1997), and related cases. Moreover, and [35] relatedly, the standard of proof is preponderance of the evidence. *See United States* v. *Bennett*, 252 F.3d, 559, 565, (2d Cir. 2001). Finally, the cases instruct that the goal of a RICO forfeiture is punishment, not restitution, and mathematical precision is not required. *See United States* v. *Lizza Industries, Inc.*, 775, F.2d, 492, 498 (2d Cir. 1985). Each conspirator is jointly and severally liable for all proceeds foreseeably derived from the racketeering activity charged in the indictment, whether a particular conspirator actually pocketed his aliquot share or not. *See United States* v. *Corrado*, 227, F.3d 543, 554-58 (6th Cir. 2000). To the extent that the resulting computation might produce injustice in a particular case, the law permits a downward departure when uncharged or acquitted conduct results in a grossly disproportionate

sentence and the Excessive Fines Clause of the Eighth Amendment provides the ultimate safety net. However, here, it is not disputed that Braun was one-third owner of API, and received one-third of its profits, lawful and unlawful. Thus, a reasonable share of the RICO forfeiture allocable to him is the scope of unlawful activity which a preponderance of the evidence shows he was aware, not simply the acts in which he participated directly as determined by the jury in its finding of guilt beyond a reasonable doubt.

That having been said, the evidence cited above, including Braun's comment that it might be easier to sort the [36] mail properly than to bury and bundle, his awareness of the yellow sheets, his instruction on how to handle bribe payments to postal employees and customers on the books of API – as warehouse expenses – his knowledge of those payments and their obvious unlawful purpose, his familiarity with illegitimate throttling and the financial benefits to be derived therefrom, his attendance at meeting in which the three owners and Taylor discussed damage control, his reference at that meeting to the Hasler 6 as a "cookie jar" that had opened, to the benefit of API and its owners and his role as the principal financial officer of API, all indicate that Braun was a participant in a fraudulent enterprise whose dimensions he knew or had reason to know. The only aspect of the fraud that Braun may have not have had reason to know – the malfunctioning Hasler 5 meter – has been removed from the government's calculation of the amount that can be assessed against Braun in a RICO forfeiture.

Braun's dispute with the government's methodology for computing the RICO forfeiture centers on the government's assessment of the undercounting mail submitted to

the Post Office and of the losses to the Postal Service that resulted from unlawful throttling of the sorting machines below the 85% level required for automatic discounts prior to reclassification. With respect to undercounting I credit both the methodology used by Postal Inspector Ralph Nardo and the [37] estimate arrived at. The government databases were calculated using the invoices API sent its customer and the mailing statements submitted to the Postal Service. Cross-examination at trial yielded slightly more than a 1.5% discrepancy in that database, and the government has adjustment [sic] its estimates to that extent. (Nardo affidavit paragraph 8) I see no unfairness in using API's own estimates, when mailing statements were based on estimates, as part of the basis for determining the loss. Those statements were submitted with the intent that they be relied on, and in part in aid of the scheme from which Braun and others profited. Braun suggests that the degree of undercounting calculated by the government – 13.9% – is so substantial as to be absurd and thereby to undermine confidence in the method used by the government. (Braun memorandum at 8) However, this argument fails to account for the evidence of substantial burying and bundling at API, as well as the exclusion of the entire count of certain machines. Further, it fails also to factor in the payment of bribes to employees at Morgan. They were being paid for a reason, and that reason was to overlook substantial undercounting and improper sortation.

As concerns the losses from unlawful throttling, the government has relied solely on the national mailings submitted to Morgan between 8 a.m. and 2 p.m. when the plant load operation began, which the government argues is a [38] conservative approach. Braun argues that it overstates the frequency which such throttling was engaged

in to credit a small segment of Taylor's testimony in which he expressed the view that such throttling occurred daily, allegedly based on a conversation with Muninauth Pulchan, who was himself acquitted. (Braun forfeiture memorandum at 16, footnote 31) Rather, he suggests that Claudia Pearce testified the practice occurred only during period of heavy volume, at the beginning and at the end of the month. (*Id.*) However Pearce testified only that she saw Yague engaging in this practice "mostly when there is a heavy volume" i.e., at the beginning and end of the month. (Tr. 3293) – but testified also that Pulchan engaged in the practice in 1995, (Tr. 3294), and that Sylla taught her to do it in 1994 or 1995 so that she could do it when he was on vacation or otherwise absent. (Tr. 3282) Thus, her testimony was that she, Sylla, Pulchan, and Yague, at a minimum, engaged in the practice. Pulchan's acquittal is irrelevant here for the reasons noted above. *See United States* v. *Powell* and related cases discussed above. In view of both Pearce's testimony and Taylor's, the government's calculation is reasonable.

Because Braun was aware of and shared fully in the proceeds of the fraud, with the exception of the proceeds of the Hasler 5 meter, the government has agreed there is no proof it is aware of, although he certainly shared in those [39] proceeds, its [sic] is not excessive by any measure, either under the sentencing guidelines or under the Excessive Fines Clause of the Eight [sic] Amendment to hold him responsible jointly and severally for the proceeds of fraud, less the proceeds of the Halser 5 meter. Accordingly, his application for a downward departure is denied. The rule in this circuit is that Braun's payment of tax on his share of the money does not diminish RICO liability. *Lizza Industries, supra,* 775 F.2d at 497-99)

For the above reasons, a preliminary order of forfeiture will be entered holding Lawrence Braun jointly and severally liable with others to whom the order or any part of it may be made applicable in the amount of $20,717,960. I will ask you to settle an order on 10 days' notice.

* * *

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of new York, on the day of two thousand five.

(Filed Aug. 11, 2005)

UNITED STATES OF AMERICA,

Appellee,

v.

PHILIP FRUCHTER, LAWRENCE BRAUN, DAUDA YAGUE, MAMADOU SYLLA, SAMBA WILLIAM and FRANK SINGH,

Defendants-Appellants,

02-1422-cr(L)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Lawrence Braun. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: /s/ Tracy W. Young
Motion Staff Attorney